TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 256.

WATSON STEWART, APPELLANT,

vs.

THE UNITED STATES AND THE OSAGE NATION OF INDIANS.

APPEAL FROM THE COURT OF CLAIMS.

FILED APRIL 16, 1906.

(20,199.)

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INDEX.

	Original.	Print.
Petition	1	1
Plea of the Osage Nation	9	6
Traverse	10	6
Findings of fact	11	7
Conclusion of law	16	12
Opinion	16	12
Judgment	19	15
Application for appeal	20	15
Order allowing appeal	20	16
Clerk's certificate	21	16

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 17, 1906.

In the Court of Claims.

No. 23216.

WATSON STEWART
v.
THE UNITED STATES and the OSAGE NATION OF INDIANS.

I.—*Petition.*

Filed March 20, 1903.

the Honorable the Court of Claims:

The claimant, Watson Stewart, respectfully represents:

1. The claimant is a resident of the City of Davenport, in the unty of Scott, in the State of Iowa, and brings this suit under the lowing provision of the act entitled "An Act making appropria-ons for the current and contingent expenses of the Indian Depart-nt and for fulfilling treaty stipulations with various Indian tribes the fiscal year ending June thirtieth, nineteen hundred and four, d for other purposes," Approved March 3, 1903:

"SECTION 13. That any one or more of the registers and receivers the United States land offices in the State of Kansas upon whom s imposed the responsibility of making sale and disposal of the age ceded, Osage trust, and Osage diminished reserve land, in said ate, under the treaty of September twenty-ninth, eighteen hun-ed and sixty-five, between the United States and the Osage Indians, and the acts of Congress for carrying said treaty into effect, may bring suit in the Court of Claims against the Osage Nation and the United States to determine the claim of e plaintiff or plaintiffs for commissions or compensation for e sale of said lands or any service or duty connected therewith. nd the said court shall have jurisdiction to hear and determine d cause and to render judgment thereon on the merits; and e Attorney-General shall appear on behalf of the United States d the Osage Nation, and either party feeling aggrieved at the cision of the Court of Claims may appeal to the Supreme Court the United States, and the final judgment in such case shall termine the rights of all such registers and receivers similarly uated. Said Osage Nation may also appear in said suit by attorney employed with the authority of said nation. The urt of Claims shall have full authority, by proper orders and pro-s, to make parties to any such suit all persons whose presence in e litigation it may deem necessary or proper to the final determi-tion of the matter in controversy."

2. The claimant was duly appointed register of the United States nd office at Humboldt, in the State of Kansas, and took the oath office and entered upon the discharge of his duties as such register

on the first day of April in the year 1869, and continued to be such register until the twentieth day of November in the year 1871.

3. His duties as register of the said land office were prescribed and defined by the Statutes of the United States, and consisted of services in the disposal of the public lands of the United States. He performed said services as register during the term of his office as required by law, and no compensation for any duties or services in disposing of the public lands of the United States is charged in the claim for which this suit is brought.

4. While performing his duties as register of the United States land office at Humboldt, Kansas, the Secretary of the Interior, through the Commissioner of the General Land Office, required the claimant to perform the further duty of assisting to dispose
3 of the Osage ceded and Osage trust and diminished reserve lands. The claimant performed such duty as required of him and assisted as register of said land office in the disposal of said Osage ceded and Osage trust and diminished reserve lands, but no fees or commissions, or expenses were allowed and paid him therefor, except that a small amount was allowed him for the purpose of making up his maximum legal compensation, for which amount due credit is hereinafter given in the tabulated statement contained in paragraph 12 of this petition.

5. Said Osage ceded and Osage trust and diminished reserve lands were not public lands of the United States, but were private lands belonging to the Osage tribe of Indians, and it was no part of the duty of the claimant as register of a United States land office to assist in disposing of said Osage ceded and Osage trust and diminished reserve lands.

6. The treaty between the United States and the Great and Little Osage Indians concluded September 29, 1865 (Indian Treaties 1873, p. 585, Article 1, lines 26,187 to 26,201), provides as follows:

"Said lands shall be surveyed and sold, under the direction of the Secretary of the Interior, on the most advantageous terms, for cash, as public lands are surveyed and sold under existing laws, including any act granting lands to the State of Kansas in aid of the construction of a railroad through said lands; but no pre-emption claim or homestead settlement shall be recognized; and after reimbursing the United States the cost of said survey and sale, and the said sum of three hundred thousand dollars placed to the credit of said Indians, the remaining proceeds of sales shall be placed in the Treasury of the United States to the credit of the 'civilization fund,' to be used, under the direction of the Secretary of the Interior, for the education and civilization of Indian tribes residing within the limits
4 of the United States."

Said treaty in Article 2, as to the Osage trust lands (lines 26,206 to 26,215), provides:

"Which land is to be held in trust for said Indians, and to be surveyed and sold for their benefit under the direction of the Commissioner of the General Land Office, at a price not less than one dollar and twenty-five cents per acre, as other lands are surveyed and sold, under such rules and regulations as the Secretary of the Interior

shall from time to time prescribe. The proceeds of such sales, as they accrue, after deducting all expenses incident to the proper execution of the trust, shall be placed in the Treasury of the United States to the credit of said tribe of Indians," etc.

Said treaty in Article 16 (lines 26,350 to 26,361), provides:

"It is also agreed by said contracting parties, that if said Indians should agree to remove from the State of Kansas, and settle on lands to be provided for them by the United States in the Indian Territory on such terms as may be agreed on between the United States and the Indian tribes now residing in said Territory or any of them, then the diminished reservation shall be disposed of by the United States in the same manner and for the same purposes as hereinbefore provided in relation to said trust lands, except that fifty per cent. of the proceeds of the sale of said diminished reserve may be used by the United States in the purchase of lands for a suitable home for said Indians in said Indian Territory."

7. By joint resolution entitled "A resolution enabling *bona fide* settlers to purchase certain lands acquired from the Great and Little Osage tribe of Indians," approved April 10, 1869 (16 Stat. L. 55), *bona fide* settlers residing upon the land described in Articles 1 and 2 of the treaty mentioned and in part quoted in the last paragraph hereof were permitted to purchase not exceeding one hundred and sixty acres at one dollar and twenty-five ($1.25) per acre, at any time within two years from the passage of said resolution; the sixteenth and thirty-sixth sections in each township being reserved for State school purposes.

8. By the act of Congress of July 15, 1870, Section 12, 16 Stat. L. 362, provision was made for the removal of the Great and Little Osage Indians from the State of Kansas to the Indian Territory and the Indians consented thereto (Annual Report of the Commissioner of Indian Affairs, 1870, p. 6).

9. By the act entitled "An act for the relief of settlers on the Osage lands in the State of Kansas," approved May 9, 1872 (17 Stat. L. 90), the Osage trust and diminished reserve lands in the State of Kansas, excepting the sixteenth and thirty-sixth sections in each township, were made subject to disposal for cash only to actual settlers, in accordance with the general principles of the pre-emption laws.

10. The commissions and fees allowed by law to the claimant as register of the United States land office for services in disposing of the public lands under the pre-emption law, were at the date of such disposal, by virtue of the acts of April 20, 1818, and March 21, 1864, Section 4, as embodied in Section 2238 of the Revised Statutes, as follows:

"First. A fee of one dollar for each declaratory statement filed and for services in acting on pre-emption claims.

"Second. A commission of one per centum on all moneys received at each receiver's office."

The reasonable value of his services in disposing of the Osage ceded and Osage trust and diminished reserve lands was the same as that provided by said section for the disposal of public lands of the United

States, to wit: One dollar for each declaratory statement and
6 a commission of one per centum on all moneys received at the receiver's office.

11. The very large amount of additional business imposed upon the claimant by the requirement of his services in the disposal of said Osage ceded and Osage trust and diminished reserve lands, compelled him to employ an additional number of clerks to perform the clerical labor required in connection with said services, and he actually paid in salaries to said additional clerks for performing such services the sum of three thousand and nine dollars and ninety-eight cents ($3,009.98), a detailed statement of which was filed with the Commissioner of the General Land Office, but no payment of such expenses for additional salaries, or of any of the commissions or fees herein claimed was ever allowed or paid to the claimant.

12. The claimant is by reason of the premises entitled to compensation for the service, responsibility and duties required of and performed by him and the expense incurred by him as aforesaid while register of the United States land office at Humboldt, Kansas, from the first day of April, 1869, to the twentieth day of November, 1871, in disposing of the Osage ceded and Osage trust and diminished reserve lands, to a fee of one dollar for each declaratory statement, a commission of one per centum on all moneys received on the sales of said lands, and to the amount of clerk hire incurred and paid by him, particularly stated as follows:

Commissions on sales of Osage ceded land:		
Fractional calendar year ending Dec. 31, 1869	$570 21	
Calendar year ending Dec. 31, 1870	1,821 09	
Fractional year ending Nov. 20, 1871	1,781 41	
Carried forward	$4,172 71	
7 Brought forward	$4,172 71	
Commissions on sales of Osage trust and diminished reserve lands:		
Fractional calendar year ending Dec. 31, 1869	118 05	
Calendar year ending Dec. 31, 1870	867 38	
Fractional year ending Nov. 20, 1871	5,017 37	
Filing fees earned on Osage trust and diminished reserve lands	10,514 00	
Extra clerk hire on account of Osage ceded and Osage trust and diminished lands	3,009 98	
		$23,699 49

Of which amounts there are to be credited the following sums paid to him out of his commissions and fees for the purpose of making up his compensation for those years, as follows:

Part compensation paid from Osage ceded lands for—		
Calendar year ending Dec. 31, 1869.....	103 38	
Fractional year ending Nov. 20, 1871.....	186 81	
Part compensation paid from Osage trust and diminished reserve lands:		
Fractional calendar year ending Dec. 31, 1869	118 05	
Fractional calendar year ending Nov. 20, 1871	186 81	
		595 05
Amount of balance due.....		$23,104 44

13. The United States now hold, as trustee, a large sum of money belonging to the said Osage Nation of Indians which accrued from the sale and disposal of the said Osage trust and diminished
8 reserve lands, but how much of the sum above claimed to be remaining due to the claimant, as aforesaid, has been placed to the credit of the trust fund of the said Osage Nation, or how much thereof has been retained in the Treasury of the United States, or covered into said Treasury as public moneys, or otherwise, the claimant is not informed and is unable to state.

14. No other action than as aforesaid has been had on this claim in Congress or by any of the Departments.

The claimant is the sole owner of this claim and the only person interested therein; and no assignment or transfer of this claim, or of any part thereof or interest therein, has been made.

The claimant is justly entitled to the amount herein claimed after allowing all just credits and offsets. The claimant is a citizen of the United States, and has at all times borne true allegiance to the Government thereof, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government; and the claimant believes the facts as stated in this petition to be true. And the claimant prays judgment for twenty-three thousand one hundred and four dollars and forty-four cents ($23,104.44).

GEORGE A. & WILLIAM B. KING,
Attorneys for Claimant.

R. V. BELT,
ERASTUS J. TURNER,
Of Counsel.

DISTRICT OF COLUMBIA, *ss*:

Watson Stewart, being duly sworn, deposes and says: I am the claimant in this case. I have read the above petition, and the matters therein stated are true to the best of my knowledge and belief.

WATSON STEWART.

Subscribed and sworn to before me this 20th day of March, 1903.
[SEAL.] GEORGE W. TAYLOR,
Notary Public.

9 II.—*Plea of the Osage Nation.*

Filed December 14, 1903.

No. 23216.

WATSON STEWART
vs.
THE UNITED STATES and THE OSAGE NATION OF INDIANS.

For a plea to the petition of the claimant, Watson Stewart, The Osage Nation of Indians, one of the defendants named in said petition, says it is not indebted to the said claimant in the sum claimed in said petition or any part thereof or in any sum whatsoever.

LORENZO A. BAILEY,
Attorney for said Defendant.

10 III.—*Traverse.*

Filed March 8, 1904.

In the Court of Claims of the United States. December Term, A. D. 1906.

No. 23216.

WATSON STEWART
vs.
THE UNITED STATES and THE OSAGE NATION OF INDIANS.

And now comes the Attorney-General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

L. A. PRADT,
Assistant Attorney General.

11 IV.—*Findings of Fact, Conclusion of Law, and Opinion of the Court.*

Filed March 21, 1904.

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

Findings of Fact.

I.

The claimant, Watson Stewart, was appointed and commissioned register of the United States land office at Humboldt, in the State of Kansas, entered upon duty May 12, 1869, and served continuously until November 20, 1871.

II.

On November 23 and December 19, 1867, the General Land Office, by authority of the Secretary of the Interior, issued instructions to the registers and receivers in the State of Kansas for the rendition of services in the sale of lands ceded to the United States by article 1 of the treaty between the United States and the Great and Little Osage Indians, concluded September 29, 1865, and of the lands agreed to be held in trust for said Osage Indians by article 2 of the said treaty, as follows:

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *November 23, 1867.*

Register and Receiver, Humboldt, Kans.

GENTLEMEN: By the 4th article of the Sage treaty, Sept. 29, 1865, all loyal persons being heads of families and citizens of the United States or members of any tribe at peace with the United States and now residing on the lands provided by the 1st and 2d article of the treaty, to be sold by the United States, shall have the privilege at any time within one year after the ratification of this treaty of buying a quarter section each, at one dollar and twenty-five cents per acre; such quarter section to be selected according
12 to legal subdivisions of surveys, and to include as far as practicable the improvements of the settler.

This treaty was ratified by President on 21st January, 1867, hence the above privilege will expire 21 Jan'y, 1868.

The plats of survey having been nearly all furnished you, I have to direct that you publish a notice for one week in a daily paper having the largest circulation in the neighborhood of said lands; that you will prepare, from and after a certain day to be designated by you and to be as early opened as possible to hear and adjudicate, the claims of settlers claiming the privilege of said 4th article.

You will require the affidavit of the party as to loyalty and proof that they were residing on the lands before and at the date of the

treaty September 29, 1865, and that have bona fide settlement and improvements on the tracts, the character and extent of the same to be fully shown and payments made with cash.

In reporting the entries you will divide them into two classes, one comprising the entries under the 1st article, or the lands ceded and sold to the United States for $300,000, and the other enclosing the entries on lands under the 2d article of the treaty, being those held in trust for the Indians.

You will issue a new series of certificates and receipt for each class, commencing in each with No. 1. The first class you designate as Osage lands and the other as Osage Indian trust lands, and I desire that particular care shall be taken in all cases to endorse clearly on each certificate and receipt, as also on your abstracts, the name of the class to which the paper belong.

Special instructions with forms will be sent in a few days to the receiver in regard to the manner of rendering his accounts of these sales.

Very respectfully, your obt. sert.,
JOS. S. WILSON, *Commissioner.*

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *December 19, 1867.*

Register and Receiver, Humboldt, Kas.

GENTLEMEN: Referring to my letter of the 23 ult., inclosing instructions respecting the manner of keeping the records, &c., pertaining to the sale of lands ceded under 1st and 2 article of the treaty of 29 September, 1865, with the Great and Little Osage Indians, I have now to state that the following rules are to be observed by the receiver in keeping and rendering his accounts thereof, forms of which are herewith inclosed, viz:

Special accounts are to be kept of the proceeds of sales of the lands disposed of under respective articles of the treaty transcript from which are to be rendered to this office at the termination of each month and quarter.

The monthly account is to embrace to the credit of the United States the aggregate area of the land sold during the same, with the amount of postage money received therefor, and to the debit
13 of the United States the amount of money paid into the Treasury on account thereof.

The quarterly accounts are to embrace both the detailed and condensed forms, the first showing consecutively the several entries made during the quarter to the credit of the United States and to the debit of the same, the sums paid into the Treasury on account thereof, the condensed account the same items in aggregate. The receiver when making a deposit to state specifically the *fund* to which it is applicable, debiting the amount in like manner in his accounts thus:

To the credit of the "Civilization fund," under I Article, treaty 29 September, 1865.

To the credit of the "Great and Little Osage Indians," under II Article, treaty 29 September, 1865.

The register and receiver will be allowed a commission of one per cent. each on the proceeds of the sales of these lands, with limitation, as a matter of course, to the legal maximum of $2,500, inclusive of commissions and fees, &c., on the disposal of the *public lands*, the payment of which is to be made by the receiver in his capacity of disbursing agent and to be debited in a special account, together with such other expense incident to the sale of the lands alluded to as may be authorized by law and instructions.

Please acknowledge the receipt of this.

Very respectfully, your obt. sevt.,

JOS. S. WILSON,
Commissioner.

March 28 and 31, 1871, instructions were issued to said registers and receivers to take charge of the sale of lands contained in the diminished reservation of said Osage Indians, referred to in article 16 of said treaty, which were authorized to be sold by section 12 of the act of July 15, 1870 (16 Stat. L., 362), as follows:

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *March 28, 1871.*

Register and Receiver, Augusta, Kansas:

Referring to our letter to you of the 16th inst., I have now to give you the following instructions relative to the disposal of the Osage trust and diminished reserve lands in your district under the 12th section act of July 15, 1870.

Under this act these lands, except the 16th and 36th sections which were treated of in our letter to you of the 4th inst., under the decision of the Secretary dated 14th ult., are opened to settlement *after survey*, and are required to "be sold to actual settlers only, said settlers being heads of families, or over 21 years of age, in quantities not exceeding 160 acres in square form to each settler, at the price of $1.25 per acre, payment to be made in cash within one year from date of settlement or the passage of this act."

* * * * * * *

The officers will be allowed the same fee for filing as is allowed under the preemption laws, viz, $1.00 to each officer; this fee the receiver will account for in his receiver's account of *public lands*, stating the item as "fees" for (number) declaratory statements filed on Osage Indian trust and diminished reserve lands. They will also be allowed a commission of one per cent. on the cash value of the lands sold.

14 The receiver will render his account of these Indian lands in the following manner, to wit:

"He will in his receiver's account credit the United States with all moneys received during the quarter from the sale of the lands and charge the U. S. with amount deposited and the amount of authorized disbursements for the quarter.

"In his disbursing account he will charge the United States with

the authorized disbursements and credit the U. S. the said amount as carried to the receiver's account and therein charged. Voucher for payment must accompany the disbursement account; otherwise they will be disallowed.

"Nothing, however, shall be herein construed as authorizing the register and receiver to receive more than the maximum fees and commissions of $2,500 per annum now allowed by law, and the receiver in adjusting his accounts will take care to first ascertain how much short of the maximum the receipt from public lands, including the fees received from declaratory statements on the Osage lands, will bring their fees and commissions, and will then charge to the Indian fund only so much commissions as will bring their compensation to the maximum."

* * * * * * *

You will observe that these claims only refer to the diminished reserve, therefore none of the Osage trust lands are embraced in its provisions.

Be pleased to acknowledge the receipt of this.

Very respectfully,

(Signed) WILLIS DRUMMOND,
Commissioner.

Approved:

(Signed) C. DELANO,

III.

In accordance with the instructions set forth in the last preceding finding, the claimant, while register of the land office at Humboldt, Kans., performed services in the sale of lands ceded by said Osage Indians by section 1 of said treaty; of lands held in trust by the United States under section 2 of said treaty, and of lands included within the diminished reservation of said Indians under section 16 of said treaty.

The maximum compensation of $3,000 per annum, in accordance with the instructions from the General Land Office, set forth in Finding II, for each year, was duly paid by the United States to the claimant.

IV.

The following tabulated statements show the total receipts from sales and for filing fees collected for the register during the term of service of Register Stewart from May 12, 1869, to November 20, 1871, inclusive; also the total fees and commissions earned by and paid to him each year on each class of lands, and the maximum compensation allowed by law for each year, or part of year, of his term of office.

15 *Receipts from Sales of Osage Ceded Lands, Article 1 of Treaty.*

Period.	Receipts.	1 per cent. commissions.	Coms. paid Stewart.
1869, from May 12	$57,021.00	$570.21	$103.38
1870, whole year	182,109.38	1,821.09	0.00
1871, to Nov. 20, inc	178,925.45	1,789.25	186.81
	$418,055.83	$4,180.55	$290.19

Receipts from Sales of Osage Trust and Osage Diminished Reserve Lands, Articles 2 and 16.

Period.	Receipts.	1 per cent. commissions.	Coms. paid Stewart.
1869, from May 12	$11,805.26	$118.05	$27.98
1870, whole year	86,738.85	867.38	0.00
1871, to Nov. 20, inc	487,996.30	4,879.96	186.81
	$586,540.41	$5,865.39	$214.79
1871, to Nov. 20, filing fees earned		4,286.00	
Earned by Register Stewart		$10,151.39	

Total Salary, Fees, and Commissions Earned by Register Stewart from All Sources During Each Year of Service.

Period.	Public lands.	Osage Ceded.	Osage Trust.	Total.
1869, from May 12	$1,795.72	$750.21	$118.05	$2,483.98
1870, whole year	3,293.60	1,821.09	867.38	5,982.07
1871, to Nov. 20, inc	4,230.83	1,789.25	9,165.96	15,186.04
	$9,320.15	$4,180.55	$10,151.39	$23,652.09

Salary, Fees, and Commissions Paid Register Stewart on Each Class of Lands During Each Year of Service.

Period.	Public lands.	Osage Ceded.	Osage T. & D. R.	Total.
1869, from May 12	$1,692.34	$103.38	$27.98	$1,823.70
1870, whole year	3,000.00	0.00	0.00	3,000.00
1871, to Nov. 20	2,665.75	186 81	186.81	3,039.37
	$7,358.09	$290.19	$214.79	$7,863.07

Maximum Compensation Allowed by Law, and Amount Paid Register Stewart.

1869, from May 12,	maximum.	$1,912.09	Paid reg.	$1,823.70	Short .. $88.39
1870, whole year,	" .	3,000.00	" .	3,000.00	0.00
1871, to Nov. 20, inc.,	" .	2,665.75	" .	3,039.37	Excess.. 373.62
Maximum.		$7,577.84	Paid.	$7,863.07	" $285.23

Total Fees and Commissions Earned, Paid and Unpaid, on Osage Trust and Diminished Reserve Indian Lands.

Year.	Earned.	Paid.	Unpaid.
1869, from May 12.	$118.05	$27.98	$90.07
1870, whole year.	867.38	0.00	867.38
1871, to Nov. 20, inc.....	9,165.96	186.81	8,979.15
	$10,151.39	$214.79	$9,936.60
Less excess heretofore paid Stewart	.....	....	285.23
Net earnings unpaid.....	.....	....	$9,651.37

16 V.

The total amount received on sales of Osage ceded lands was $1,055,162.01. The total amount received as filing fees of $2 for each declaratory statement on Osage ceded lands was $8,570.

The total amount received on sales of Osage trust and diminished reserve lands was $9,608,156.27. The total amount received as filing fees of $2 for each declaratory statement on Osage trust and diminished reserve lands was $130,596.

The filing fees on both the ceded and the trust and diminished reserve lands were covered into the Treasury of the United States.

The total amount of money held in trust by the Government for said Osage Indians arising out of the sale of their lands under said treaty of September 29, 1865, is $8,327,439.07, on which interest at 5 per cent. is paid by the United States, amounting annually to $416,371.95.

Conclusion of Law.

On the foregoing findings of fact, the court decides, as a conclusion of law, that the claimant is not entitled to recover, and that his petition should be dismissed.

Opinion.

WRIGHT, *J.*, delivered the opinion of the court:

Claimant brings this suit as one of the registers under the authority of the act of Congress approved March 3, 1903 (32 Stat. L., pt. 1-1010), which provides, in effect, that any one or more of the regis-

ters and receivers of the United States land office in the State of Kansas who had the responsibility of the sales of the Osage ceded, trust, and diminished reserve land, under the treaty of September 29, 1865, with the Osage Indians, and the acts of Congress for carrying the treaty into effect, may bring suit in this court against the Osage Nation and the United States to determine the claim of the plaintiff or plaintiffs for commissions or compensation for the sale of said lands or any service or duty connected therewith, and by that act this court is given jurisdiction to hear and determine the cause, and to render judgment therein on the merits.

The above mentioned treaty (Ind. Treaties, 1873, 585) as far as it is material to this decision to state, in effect required the ceded lands to be surveyed and sold, under the direction of the Secretary of the Interior, on the most advantageous terms for each (the United States and the Indians), as public lands are surveyed and sold under existing laws, withholding, however, preemption claims and homestead settlements, the net proceeds of such sales remaining after cost of survey and sale had been paid, and the sum of $300,000 placed to the credit of the Osage Indians, to be placed to the credit of the "Civilization fund," for the education and civilization of Indian tribes in the United States. The trust lands were required to be surveyed and sold for the benefit of the Osage Indians at a price not less than $1.25 per acre, as other lands are surveyed and sold, under such rules and regulations as the Secretary of the Interior shall from time to time prescribe, and the proceeds of such sales, after deducting all expenses incident to the proper execution of the trust, to be placed in the Treasury of the United States to the credit of the Osage Indians. And it was agreed, that if the Indians should
17 remove from the State of Kansas which they did), the diminished reserve lands should be disposed of in the same manner and for the same purposes provided in relation to the trust lands, except that 50 per cent. of the proceeds thereof might be used in the purchase of lands for a suitable home for the Osage Indians in the Indian Territory.

Appropriate legislation was passed by Congress to carry into effect the treaty and to sell the lands mentioned therein in accordance with its terms. The Secretary of the Interior, November 23 and December 19, 1867, issued to the registers and receivers at Humboldt, Kans., his instructions containing rules and regulations relative to the sale of the ceded and trust lands, and also on March 28, 1871, relative to the diminished reserve lands, like instructions, in all of which it was explicitly stated, in effect, that the registers and receivers would each be allowed a commission for the sale of the lands of all classes—ceded, trust, and diminished reserve—of 1 per cent. each on the proceeds of the sales, with limitation to the legal maximum compensation provided by law, inclusive of commissions and fees on the disposal of public lands; and in the instructions of March 28, 1871, the former instructions relative to compensation were restated and epitomized in the following language: "Nothing, however, shall be herein construed as authorizing the register and receiver to receive more than the maximum fees and commissions of $2,500 per annum now

allowed by law, and the receiver in adjusting his accounts will take care to first ascertain how much short of the maximum the receipt from public lands, including the fees received from declaratory statements on the Osage lands, will bring their fees and commissions, and will then charge to the Indian fund only so much commissions as will bring their compensation to the maximum."

The treaty in question constituted the contract between the United States and the Osage Indians by which the latter ceded and surrendered all their rights and interests in the lands embraced in the Kansas reservation, and is to be construed like other contracts. Every provision and stipulation in the contract should be given the force and effect intended by the parties thereto at the time it was entered into. It will not be disputed that it was the intention of the parties that the sale of the lands should produce to the beneficiaries, the Indians, as large a net sum as was reasonably practicable. It was stipulated in the contract that the lands should be surveyed and sold under the direction of the Secretary of the Interior on the most advantageous terms, as public lands are surveyed and sold, and under such rules and regulations as that officer might from time to time prescribe. By the terms of the contract the Indians were entitled to the judgment and discretion of the Secretary of the Interior, and to have that officer use his valuable services in the direction of the sales of their lands. This they might well have regarded as a strong protection to their rights and interests, and was no doubt a considerable inducement for them to enter into the contracts as they did. In accordance with this contract as regards the Indians, and otherwise in obedience to law, the Secretary of the Interior did exercise his judgment and discretion in the sale of the lands, and among other things added to the duties of the register and receiver the sales of the same, fixing the compensation for such services, in effect, at the difference between the commissions and fees on disposal of pub-
18 lic lands and the maximum compensation allowed by law, and in no event should such compensation exceed the legal maximum.

While the rules and regulations so prescribed by the Secretary of the Interior were in force the claimant accepted the appointment and qualified as register. He performed the services so required of him, and received the maximum compensation provided therefor by law and the regulations of the Secretary of the Interior, without objection or protest, or claim for more compensation, so far as we discover in the record, until in February, 1902, thirty years after the last service was performed, when he initiated this claim in Congress, and by them it has been sent to this court for our determination. We are of the opinion that claimant voluntarily undertook to do, and did perform, the services described in his petition for the compensation he has already received, and that neither the United States nor the Osage Nation is liable to him for further compensation, nor did such liability exist at any time.

The case of *Brindle* (110 U. S., 688), upon which much reliance is placed by counsel for claimant, is easily distinguished from the case presented here. In that case it was said that so far as anything

appeared in the record then before the court, the appointment of Brindle was not made because he was receiver of the land office. In the present case no specific personal appointments were made, but the registers and receivers generally were designated to perform the service, and the duties were assigned to their respective offices without regard to the personal incumbents then existing. Claimant was not at the time of such designation and assignment of duties a register, but was appointed, and accepted such appointment, after the disposal of the ceded and trust lands had been attached to the office in which he qualified and thereby obligated himself to perform all such duties as appertained thereto. The disposal of the diminished reserve lands was later included, but by continuing in the service claimant must be considered as having acquiesced in that action. Having voluntarily assumed to discharge all the duties of the office, he must be presumed to have known what the duties were, and that the services for which he now seeks further compensation were engagements included in his acceptance of the office at the time he entered upon the performance of its duties, which is further evidenced by his continued service without objection, and for the designated compensation. In the present case the appointment of claimant to the office of register included the appointment to do the business appertaining to the sale of the identical lands in question, without special mention.

In conformity to the views herein expressed, the petition of the claimant will be dismissed.

19 V.—*Judgment of the Court.*

No. 23216.

WATSON STEWART
v.
THE UNITED STATES and THE OSAGE NATION OF INDIANS.

At a Court of Claims held in the City of Washington on the 21st day of March, 1904 judgment was ordered to be entered as follows:

The Court on due consideration of the premises find for the defendants and do order, adjudge and decree that the petition of the claimant, the said Watson Stewart, be and the same is hereby dismissed.

BY THE COURT.

20 VI.—*Application for and Allowance of Appeal.*

No. 23216.

WATSON STEWART
v.
THE UNITED STATES and THE OSAGE NATION OF INDIANS.

Now comes the claimant, Watson Stewart, and appeals to the Supreme Court of the United States from the judgment of this court

entered on the 21st day of March, 1904, dismissing his petition and moves for an allowance of this appeal.

GEORGE A. & WILLIAM B. KING,
Attorneys for Claimant.

Filed May 31, 1904.

Ordered that the aforesaid application for appeal be allowed as prayed for.

April 9, 1906.

BY THE COURT.

21 Court of Claims.

No. 23216.

WATSON STEWART
v.
THE UNITED STATES and THE OSAGE NATION OF INDIANS.

I, John Randolph, Assistant Clerk Court of Claims, hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the findings of fact and conclusion of law, and of the opinion filed by the Court; of the judgment of the Court; of the application for, and allowance of, appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims this 16 day of April A. D., 1906.

[Seal Court of Claims.]

JOHN RANDOLPH,
Asst. Clerk Court of Claims.

Endorsed on cover: File No. 20,199. Court of Claims. Term No. 256. Watson Stewart, appellant, *vs.* The United States and The Osage Nation of Indians. Filed April 16th, 1906. File No. 20,199.

FILE COPY.

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IN THE

Supreme Court of the United States.

October Term, 1906

No. 256.

WATSON STEWART, *Appellant,*

v.

THE UNITED STATES

and the

OSAGE NATION OF INDIANS.

APPEAL FROM THE COURT OF CLAIMS.

Brief for Appellant.

GEORGE A. KING,
WILLIAM B. KING,
Attorneys for Appellant.

R. V. BELT,
Of Counsel.

Table of Contents.

		Page.
I.	Statement of the Case	1
II.	Assignment of Error	5
III.	Brief of Argument	6
	The question adjudicated	6
	The Brindle Case	6
	Cases following the Brindle case	12
	Distinction in opinion of Court below	14
	Departmental ruling not conclusive	15
	Construction of the Act of Congress	16
	These lands treated as trust lands	18
	Commissions on ceded lands	19
	Services outside of statutory duties	22
	Payment of expenses required by treaty	25
	Presumptions in favor of officer	27
	Amount of compensation	29
	Conclusion	31

IN THE

Supreme Court of the United States.

October Term, 1906.

WATSON STEWART, *Appellant*,
v.
THE UNITED STATES and the OSAGE NATION OF INDIANS. } No. 256.

BRIEF FOR APPELLANT.

I. Statement of the Case.

This suit was brought in the Court of Claims by authority of section 13 of the Indian Appropriation Act for the year ending June 30, 1904, approved March 3, 1903 (32 Stat. L. 1010, 1011), set forth in full in the petition, Record, p. 1.

The claimant, Watson Stewart, was register of the land office at Humboldt, Kansas, from May 12, 1869, to Novomber 20, 1871. While serving in that office he was required by the Secretary of the Interior to render services in the sale and disposal of lands ceded by the Osage Indians by article 1 of the treaty concluded September 29, 1865; of lands held in trust for those Indians under article 2, and of lands included within their diminished reservation under article 16, which diminished reservation was to be disposed of for the same purpose as the trust lands.

The material provisions of the treaty are set forth in the petition, paragraph 6, Record, p. 2.

The statutes authorizing the sale of the lands are set forth in the petition, paragraphs 7, 8, 9, Record, p. 3.

The lands ceded by article 1 were to be sold for cash; no pre-emption claim or homestead settlement to be recognized. Three hundred thousand dollars ($300,000) of the proceeds of the sale were to be placed to the credit of the Indians to reimburse the United States for an advance of that amount to them, and the remainder to be placed in the Treasury to the credit of the "civilization fund," to be used for the education and civilization of the Indian tribes (1819, March 3, ch. 85, 3 Stat. L. 516).

In article 1 of the treaty it is provided (Petition, par. 6, Record, p. 2):

"And after reimbursing the United States the cost of said survey and sale, and the said sum of three hundred thousand dollars placed to the credit of said Indians, the remaining proceeds of sales shall be placed in the Treasury of the United States to the credit of the 'civilization fund,' to be used, under the direction of the Secretary of the Interior, for the education and civilization of Indian tribes residing within the limits of the United States."

In article 2 it is provided (Petition, Record, top p. 3):

"The proceeds of such sales, as they accrue, after deducting all expenses incident to the proper execution of the trust, shall be placed in the Treasury of the United States to the credit of said tribe of Indians," etc.

In article 16 it is provided (Petition, Record, p. 3):

"The diminished reservation shall be disposed of by the United States in the same manner and for the same purposes as hereinbefore provided in relation to said trust lands."

The proceeds of the sale of the ceded lands were over one million dollars. Those of the trust and diminished reserve lands were over nine million six hundred thousand dollars (Finding V, Record, p. 12).

The Revised Statutes provides as follows:

"Section 2238. Registers and receivers, in addition to their salaries, shall be allowed each the following fees and commissions, namely:

"First. A fee of one dollar for each declaratory statement filed and for services in acting on pre-emption claims.

"Second. A commission of one per centum on all moneys received at each receiver's office."

Section 2237 allows each register and receiver an annual salary of $500. Section 2240 provides that the compensation of registers and receivers including salary, fees and commissions shall in no case exceed in the aggregate $3,000 each, and section 2241 provides that whenever the amount of compensation exceeds the maximum, the excess shall be paid into the Treasury as other public moneys.

The appellant received his maximum compensation of $3,000 each year that he was in service. (Finding IV, table top of page 12.) This was made up almost wholly from the public lands, though a slight amount was added from the Osage lands to make up the maximum during his first fractional year and last fractional year of service. (Finding IV, table foot of page 11.)

The instructions given by the Department to the claimant and other land officers in Kansas fix the value of their services in the disposal of these lands at the same amounts, though the instructions limit the total compensation to the maximum fixed by Rev. Stat. Sec. 2240, as shown below.

The instructions of December 19, 1867, contain the following:

"The register and receiver will be allowed a commission of one per cent each on the proceeds of the sales of these lands, with limitation as a matter of course to the

legal maximum of $2,500 of commissions and fees, inclusive, etc., on the disposal of the public lands, the payment of which is to be made by the receiver in his capacity of disbursing agent and to be debited in a special account, together with such other expenses incident to the sale of the lands alluded to as may be authorized by law and instructions." (Instructions of General Land Office, Record, top p. 9.)

Those of March 28, 1871, contain the following:

"The officers will be allowed the same fee for filing as is allowed under the pre-emption laws, viz: $1.00 to each officer; this fee the receiver will account for in his receiver's account of public lands, stating the item as 'fees' for (number) declaratory statements filed on Osage Indian Trust and Diminished Reserve Lands. They will also be allowed a commission of one per cent on the cash value of the lands sold.

"The receiver will render his account of these Indian lands in the following manner, to-wit:

"He will in his receiver's account credit the United States with all moneys received during the quarter from the sale of the land and charge the United States with the amount deposited and the amount of authorized disbursements for the quarter. In his disbursing account he will charge the United States with the authorized disbursements and credit the U. S. the said amount as carried to the receiver's account and therein charged. Voucher for payments must accompany the disbursement account, otherwise they will be disallowed. Nothing, however, shall be herein construed as authorizing the register and receiver to receive more than the maximum fees and commissions of $2,500 per annum now allowed by law, and the receiver in adjusting his account will take care to first ascertain how much short of the maximum the receipt from public lands, inclusive the fees received from declaratory statements on the Osage lands, will bring their fees and commissions and will then charge the Indian fund only so much commissions as will bring their compensation to the maximum." (Instructions of General Land Office, Record, pp. 9, 10.)

The filing fees of two dollars (one dollar to the register and one dollar to the receiver) for each declaratory statement paid by the purchasers of the lands were covered into the United States Treasury.

The Government now holds about eight and one-third million dollars in trust for the Osages, interest on which at five per cent is annually paid to them, amounting to nearly half a million dollars. (Finding V, Record, p. 12.)

This suit was brought to recover a commission of one per cent on the amount of the sales of the lands and the filing fees now in the Treasury as a reasonable compensation for the services of the claimant in the sale of these lands as outside of and in addition to his regular official duties in the sale of public lands.

The Court of Claims decided adversely to the claim and dismissed the petition. The grounds of this decision are stated in the opinion by Judge Wright, Record, pp. 12 to 15. The following sentence contains the gist of the decision, Record, p. 15:

"Having voluntarily assumed to discharge all the duties of the office, he must be presumed to have known what the duties were, and that the services for which he now seeks further compensation were engagements included in his acceptance of the office at the time when he entered upon the performance of its duties, which is further evidenced by his continued service without objection, and for the designated compensation."

From this judgment, the claimant, Watson Stewart, appealed, Record, pp. 15, 16.

II. Assignment of Error.

The appellant hereby assigns for error that the Court of Claims held that he was entitled to no additional compensation for the sale of the Osage ceded trust and diminished reserve lands, and dismissed his petition; whereas

said court should have held that he was entitled to such additional compensation and should have given judgment in his favor.

III. Brief of Argument.

The Question Adjudicated.

The right of registers and receivers to a reasonable compensation for the sale of Indian lands under treaties similar to that of 1865 with the Great and Little Osage Indians has been settled and adjudicated by this court. We therefore quote the material part of the opinion of this court upon which we rely. We shall then show that that opinion has been followed both by this court and by other courts in the disposition of similar cases as well as by special acts of Congress for the relief of other officers similarly situated.

The Brindle Case.

The case of *United States* v. *Brindle* (110 U. S. 688) came before this court under the provisions of the Act of 1878, June 10, Chap. 179 (20 Stat. L. 541) authorizing a full settlement of accounts on both sides in an action brought by the United States against the late receiver of the Pawnee Land District in Kansas.

The report of this case in 110 U. S. makes no reference to the special act governing it. That act provided, among other things:

"And in the trial of said cause the said court shall hear and determine all disputes and differences between the United States and the said William Brindle in reference to his various accounts as receiver and acting disbursing agent of public money in the Pawnee land district in Kansas, and also in relation to his accounts as special receiver of Indian trust moneys received and expended under the Indian treaties of May sixth and May

thirtieth, eighteen hundred and fifty-four, as well under said Indian treaties as under the laws of the United States; and the said William Brindle, in the trial of said cause, shall be permitted and be entitled to make defense and claim set-off in his favor in said court, if said court shall determine him to be entitled thereto, with the same effect as if said suit were commenced by an individual against the said William Brindle, and said set-off shall not be barred by any statute of limitations." 20 Stat. L. 541.

In the opinion of this court delivered by Mr. Chief Justice Waite, it is said:

"The facts on which the claim for commissions on sales of Indian trust lands depend are these:

"On the 17th of July, 1854, a treaty was concluded with the Delaware tribe of Indians, 10 Stat. 1048, the material parts of which are as follows:

"'Art. 1. The Delaware tribe of Indians hereby cede, relinquish and quit-claim to the United States all their right, title, and interest in and to their country,' describing it, and also their right, title, and interest in what was then known as 'the outlet.'

"'Art. 2. The United States hereby agree to have the ceded country (excepting the said "outlet"), surveyed, as soon as it can be conveniently done, in the same manner that the public lands are surveyed, such survey to be commenced and prosecuted as the President of the United States may deem best. And the said President will, so soon as the whole or any portion of said lands are surveyed, proceed to offer such surveyed lands for sale, at public auction, in such quantities as he may deem proper, being governed in all respects, in conducting such sales, by the laws of the United States respecting the sales of public lands; and such of the lands as may not be sold at the public sales, shall thereafter be subject to private entry, in the same manner that private entries are made of United States lands; and any, or all, of such lands as remain unsold after being three years subject to private entry, at the minimum government price, may, by act of Congress, be graduated and reduced in price, until all

said lands are sold; regard being had in said graduation and reduction to the interests of the Delawares, and also to the speedy settlement of the country.

"'Art. 3. The United States agree to pay to the Delaware tribe of Indians the sum of ten thousand dollars; and, in consideration thereof, the Delaware tribe of Indians hereby cede, release and quit-claim to the United States, the said tract of country hereinbefore described as the "outlet." And as a further and full compensation for the cession made by the first article, the United States agree to pay to said tribe all the moneys received from the sale of the lands provided to be surveyed in the preceding article, after deducting therefrom the cost of surveying, managing and selling the same.'

"Another article provided for the permanent investment of such of the proceeds as were not required for the present wants of the Indians, and for the disposition of the interest on the investments.

"On the 10th of August, in the same year, the Kaskaskias, and Peorias, and certain tribes of the Piankeshaw and Wea Indians, ceded certain of their lands to the United States, by a treaty the same in its general provisions as that of the Delawares. 10 Stat. 1082.

"Section 5 of the act of March 3, 1855, c. 204, 10 Stat. 700, passed after these treaties were concluded, is as follows:

"'That to enable the President of the United States to carry out, in good faith, the recent treaties with the * * * Delawares * * * and the United tribes of Kaskaskias and Peorias, Piankeshaws and Weas * * * there shall be, and hereby is, appropriated, the sum of twenty thousand dollars, in addition to the appropriations heretofore made, for the execution of the surveys required by said treaties; and where the net proceeds of the lands ceded by either of said treaties are required to be paid over to the Indians, the President shall cause said lands, or such parts thereof as he may deem proper to be classified and valued, and when such classification and valuation have been made to his satisfaction, he shall cause said lands to be offered at public sale, by legal subdivisions or town lots, at such times and places and in such manner and

quantity, as to him shall appear proper and necessary to carry out faithfully the stipulation in said treaties; and said lands shall not be sold at private sale for a less price than that fixed by the valuation aforesaid, nor shall any land be sold at a less price than one dollar and twenty-five cents per acre, for three years, and thereafter as may be directed by law pursuant to the treaty.'

"By an act of July 9, c. 174, 4 Stat. 564, as afterwards amended, and now section 463 of the Revised Statutes, the Commissioner of Indian Affairs, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, has the management of Indian Affairs, and of all matters arising out of Indian relations. The same act (now section 462 Rev. Stat.) also provides that all accounts and vouchers for claims and disbursements connected with Indian affairs shall be transmitted to the commissioner for administrative examination, and by him passed to the proper accounting officer of the Treasury Department for settlement. The Second Auditor of the Treasury is charged by law with the duty of receiving and examining all accounts relating to Indian affairs and transmitting them to the second comptroller for his decision thereon. Rev. Stat., section 277, subdivision second.

"There must be appointed a register of the land office and a receiver of public moneys for each land district established by law, to reside at the place where the land office to which he is appointed is kept. Rev. Stat., sections 2234, 2235, re-enacting other statutes to the same effect.

"The Commissioner of the General Land Office has power to audit and settle all public accounts relating to the public lands, and to transmit the accounts and vouchers to the First Comptroller of the Treasury for his examination and decision thereon. Rev. Stat., section 456.

"Section 18 of the act of August 31, 1852, 'making appropriations for the civil and diplomatic expenses of the Government,' c. 108, 10 Stat. 100, is as follows:

"'No person hereafter who holds or shall hold, any office under the Government of the United States, whose salary or annual compensation shall amount to the sum

of two thousand five hundred dollars shall receive compensation for discharging the duties of any other office.'

"On the 24th of October, 1856, Brindle, the defendant in error, 'was duly appointed special receiver and superintendent to assist the special commissioner to dispose of the Delaware Indian trust lands at Fort Leavenworth, in the Territory of Kansas, under the treaty with the Delaware tribe of Indians.' On the 18th of February, 1857, he was appointed and commissioned for four years as receiver of public moneys for the district of lands subject to sale at Lecompton, Kansas, and on the 15th of May, 1857, he was duly appointed as special receiver and superintendent to assist the special commissioner to dispose of the trust lands of the Kaskaskia and Peoria, Piankeshaw and Wea Indian confederated tribes of Indians at Paoli, Kansas Territory.

"These Indian trust lands were never public lands of the United States, and were never subject to sale at the Lecompton land office. The cessions to the United States were in trust, to survey, manage and sell the lands and pay the net proceeds to or invest them for the Indians. There was never a time that the United States occupied any other position under the cessions than that of trustees, with power to sell for the benefit of the Indians. In equity, under the operation of the treaties, the Indians continued, until sales were made, the beneficial owners of all their country ceded in trust. Of this, we have no doubt. The treaties are full of evidence to that effect. It is unnecessary to state it in detail.

"It follows that it was never any part of the official duty of Brindle, as receiver of public moneys at the Lecompton land office, to sell the trust lands or receive payments therefor. His duties in connection with that office were to receive and account for moneys paid for public lands, that is to say, the public moneys of the United States derived from the sales of public lands. The moneys paid for the Indian lands were trust moneys, not public moneys. They were at all times in equity the moneys of the Indians, subject only to the expenses incurred by the United States for surveying, managing, and selling the lands.

"When, therefore, Brindle was appointed special receiver and superintendent, to assist the special commissioner in disposing of the trust lands, he was employed to render a service in no way connected with the office he held. He was not appointed to any office known to the law. No new duty was imposed on him as receiver of the land office. The President was, both by the treaties and the act of 1855, charged with the duty of selling the lands, and under his instructions Brindle was employed to assist in that work. By express provisions in the treaties the expenses incurred by the United States in making the sales were to be paid from the proceeds. This clearly implied the payment of a reasonable compensation for the services of those employed to carry the trust into effect.

"In *Converse* v. *United States*, 21 How. 463, it was decided that provisions in appropriation acts, like section 18 of the act of August 31, 1852, prohibiting an officer from receiving more than one salary, could not by 'fair interpretation be held to embrace an employment which has no affinity or connection, either in its character or by law or usage, with the line of his official duty, and where the service to be performed is of a different character and for a different place, and the amount of compensation regulated by law' p. 471. In the present case the employment was for a special service in connection with a special trust assumed by the United States for the benefit of certain Indian tribes, in which express provisions were made for the payment of expenses. In legal effect, the appointment was to an agency for the sale of lands for the Indians, with an implied understanding that a reasonable compensation would be paid for the services rendered. So far as anything appears in the record, the appointment was not made because Brindle was a receiver of the land office. The duties to be performed were of a different character and at a different place from those of the land office, and while the exact amount of compensation for this service was not fixed, it was clearly to be inferred that such compensation as the law implies where labor is performed by one at the request of another, that is to say, a reasonable compensation, would be paid.

This case comes, therefore, within the rule of *Converse* v. *United States*, and Brindle is not excluded by the act of 1852 from demanding compensation for this service by reason of his being receiver of the land office.

* * * * * * *

"The judgment is therefore reversed, and the cause remanded with instructions to enter another judgment in favor of the defendant in error in accordance with the finding G; that is to say, for $14,541.78, as of June 13, 1879, the date of the verdict, the judgment to draw interest from that date."

Cases Following the Brindle Case.

In *United States* v. *Saunders* (120 U. S. 126, 130) the court construes the case above quoted as follows.

"The case of *United States* v. *Brindle*, 110 U. S. 688, in which an Indian agent received large additional compensation for services connected with the sale of lands belonging to the Indians of his agency, which was affirmed in this court, was upon the ground that these additional services were performed for the benefit of the Indians and the statute implied the payment of a reasonable compensation for such services."

Meigs v. *United States* (19 C. Cls. 497, 503, 504) thus more accurately summarizes the decision:

"A receiver of public moneys in Kansas was appointed agent for the sale of Indian trust lands under a treaty with an Indian tribe; and the court, citing the second sentence of this quotation from the decision in the previous case, held that he was entitled to commissions on those sales, in addition to the full compensation as receiver allowed him by law. And in regard to the matter of his compensation, the court ruled that while the exact amount of it was not fixed, 'it was clearly to be inferred that such compensation as the law implies where labor is to be performed by one at the request of another, that is to say, a reasonable compensation would be paid.'"

Even more directly in point as a case decided on the authority of the *Brindle* case is *United States* v. *Rogers* (81 Fed. Rep. 941).

In that case certain lands had been ceded by the Indians to the United States to be sold and the proceeds to be deposited in the Treasury of the United States to the credit of the Indians. The action was against the sureties on the receiver's bond for failure to account for such proceeds.

The court said (p. 943):

"The lands thus relinquished to the United States for the purposes stated were not public lands subject to sale at the land office at which Danilson was receiver. Their relinquishment, like the cessions involved in *United States* v. *Brindle*, 110 U. S. 688, was made to the Government in trust to survey and sell the lands, and pay the net proceeds to, or invest them for the Indians. What was said by the Supreme Court in the case cited in respect to the receiver of public moneys at the Lecompton land office is equally applicable here. It was never any part of the duty of Danilson, as receiver of public moneys at the Blackfoot land office, to sell the trust lands, or receive the payments therefor. His duties in connection with that office, 'were to receive and account for moneys paid for public lands; that is to say, the public moneys of the United States derived from the sales of public lands. The moneys paid for the Indian lands were trust moneys, not public moneys. They were at all times, in equity, the moneys of the Indians, subject only to the expenses incurred by the United States for surveying, managing and selling the land.' These trust moneys constituted no part of the public moneys or property for which the defendants, as sureties upon the bond of Danilson, became responsible."

The *Brindle* case has also been made a basis of action by Congress in legislation for the payment of claims of similar officers making sales of lands of Indians. (See

the act for the relief of John W. Whitfield, 27 Stat. L. 768, and the act for the relief of Moore and Woodson, 28 Stat. L. 580.)

Distinction in Opinion of Court Below.

The opinion of the learned court below in comparing this case with that of Brindle from which we have so fully quoted, distinguishes it, Record, pp. 14, 15, in the fact that the instructions given by the General Land Office under the authority of the Secretary of the Interior, Finding II, Record, pp. 7 to 10, imposed these duties upon him as a portion of the duties of his office, and that as he accepted the office after some of these duties were imposed upon him by the circulars of the General Land Office while others relating to the diminished reserve, were imposed upon him during his term of office, pp. 9, 10, and he proceeded to render the services, he has no claim for any additional compensation. The instructions given to the appellant under them are, in effect, treated as constituting a contract to perform the duties imposed upon him without other or additional compensation than that given by the law for strictly official services. The response to this view is:

1. That the instructions of the Department did not and could not constitute a contract and were not intended as such. They constituted simply an official ruling that the duties involved in the sale of these lands were strictly official duties, a ruling which must be regarded in the light of the decision in the *Brindle* case as erroneous.

2. That the terms of the act of Congress referring the claim to the Court of Claims quoted, Record, p. 1, preclude any defense arising from the voluntary performance of the service under the instructions given at the time without the appellant then objecting to that view, and require the Court of Claims "to render judgment thereon on the merits."

Department Ruling Not Conclusive.

Looking at the instructions, Record, pp. 7 to 11, it will be seen that they throughout proceeded upon the theory that the lands, the sale of which was imposed upon the appellant in common with all other registers and receivers, were public lands of the United States.

The instructions of the Secretary of the Interior so far as they related to the question of compensation contained not a proposal to the claimant to enter into a contract, but an official ruling and an erroneous one at that. Where officers of the Government in good faith comply with such rulings of their superior officers, they lose no rights by so doing. They are not bound to put themselves in the position of contentious and disobedient officers. Their compliance with their instructions, so far from constituting an agreement to a contract, express or implied, puts them in a position peculiarly favorable for the assertion of their rights in the courts in opposition to such rulings where the rulings are found to be erroneous. This was decided by this court in *United States* v. *Lawson*, and *United States* v. *Ellsworth*, 101 U. S. 164, 170.

The following remarks in the *Lawson* case might well have been written of the present case:

"Confessedly, the order was official and peremptory, and under such circumstances it may well be inferred that the party felt that, if he refused to obey, the refusal would cost him his commission. Had he refused to comply with the order or entered a protest, his act might have been regarded as contumacious, and have proved as injurious in its consequences to the incumbent of the office as if he had declined to discharge the ordinary duties of the collector. Viewed in the light of the attending circumstances, and especially of the fact that the order came from the Commissioner of the Customs, to whom he was immediately responsible, we can not hold that the payments were voluntary, within the meaning of

the judicial rule, which, in consequence of the payment, denies to the party making the same the right to recover it back." (*United States* v. *Lawson*, 101 U. S. 169.)

The same principle has been many times followed. *Swift Co.* v. *United States*, 111 U. S. 22, 29; *Robertson* v. *Frank Brothers Co.*, 132 U. S. 17, 23; *United States* v. *Mosby*, 133 U. S. 273, 279; *United States* v. *Post*, 148 U. S. 124, 133; *Glavey* v. *United States*, 182 U. S. 595.

The official ruling of the Department of the Interior, therefore, made before the time of these sales was no more conclusive against the right of the claimant to recover in this suit than are the rulings made by the Interior and Treasury Departments since. They are simply departmental decisions binding neither party when the matter comes to be litigated in the courts of law.

These departmental rulings are plainly within the reviewing power of the Court of Claims under its general jurisdiction, as shown in *Medbury* v. *United States* (173 U. S. 492), and much more so under the terms of the jurisdictional statute under which the case comes here.

The error of the instructions of the Secretary of the Interior consisted in ignoring the trust character of the lands, and in treating them, so far as compensation of the land officers was concerned, as a part of the public lands. It is this error which we have the right to ask the court to correct in this proceeding under the authority conferred by the jurisdictional act of 1903, and in the light of judicial decision rendered subsequently to the performance of the services.

Construction of the Act of Congress.

The terms of the act of Congress, Record, p. 1, preclude the defense which has been sustained in the decision of the Court of Claims. The very object of the refer-

ence was to obtain a ruling whether the services in the sale of these lands were additional to the duties imposed upon the appellant by the terms of his commission. This object would be defeated by holding that the ruling of the department on that subject is conclusive. We have shown that even in cases under the general jurisdiction of the court such rulings do not constitute the exclusive measure of the rights of a party dealing with the Government; much less do they so when the reference is under a special act.

This court has decided a number of cases on appeal from the Court of Claims where cases have been referred to that court by special acts, and has always held that the passage of such an act is a waiver of mere technical estoppels. This was notably the case in *Roberts* v. *United States*, 92 U. S. 41. So too, in *United States* v. *Steever*, 113 U. S. 747, it was held that the act reopened payments of prize money previously made, and authorized the court to allow to each captor such a sum as, together with the sum formerly paid him, would equal his lawful share of prize money.

Again in *Briggs* v. *United States*, 143 U. S. 346, it was held that a special act referring a claim for cotton captured during the civil war to the Court of Claims must be regarded as having been passed in view of well-known facts and to authorize and require that court to give judgment for whatever amount of cotton was shown to have been taken from him.

In the present case, Congress must be presumed to have known that the departmental rulings did not permit the appellant to receive the fees and commissions on the sale of these lands which he claimed as additional to the regular duties imposed upon him by law. It seems little better than a mockery for Congress to refer him to the Court of Claims only to be turned out of that

court by the suggestion that the very rulings which prevented him from obtaining payment are conclusive and can not be questioned.

These Lands Treated as Trust Lands.

The remarks which we have made have special reference to the objections made in the opinion of the Court of Claims. We now desire to show that the lands in question in this case have been thruout treated as trust lands.

Article 2 (Petition, Record, foot p. 2) provides "Which land is to be held in trust for said Indians."

Also (top p. 3)—

"The proceeds of such sales, as they accrue, after deducting all expenses incident to the proper execution of the trust, shall be placed in the Treasury of the United States to the credit of said tribe of Indians," etc.

The instructions given to the land officers December 19, 1867 (Record, p. 89), require the commission of one per cent wherever it was paid "to be made by the receiver in his capacity of disbursing agent and to be debited in a special account together with the other expenses," etc.

And the instructions of March 28, 1871, provide that receivers "will then charge the Indian fund only so much commissions as will bring their compensation to the maximum" (p. 10), thus distinguishing between "the Indian fund" and "the receipt from public lands" referred to in the previous part of the same instructions.

In 1880 it was decided by Congress that the 16th and 36th sections included in both the ceded lands and the trust and diminished reserve lands were not subject to the reservation of those sections made in the act of January 29, 1861, admitting Kansas into the Union (Sec. 3, Par. 1, 12 Stat. L. 127), on the ground that "a trust

was created for the disposal of the lands of said Indians in the State of Kansas." These words are in the preamble to the act of June 16, 1880, entitled "An act to carry into effect the second and sixteenth articles of the treaty between the United States and the Great and Little Osage Indians proclaimed January 1, 1867" (21 Stat. L. 291). The body of the act repeatedly refers to "the trust for the sale of these lands," "said trust," and "said trust funds." Although the title of the act only refers to the second and sixteenth articles of the treaty, the proviso at the close of the act (p. 292) applies the same principle to "Osage lands ceded by the first article of the treaty aforesaid."

It can be said of these lands precisely what this court said of the lands involved in the *Brindle* case (110 U. S. 693):

"In equity, under the operation of the treaties, the Indians continued, until sales were made, the beneficial owners of all their country ceded in trust. Of this we have no doubt. The treaties are full of evidence to that effect."

Commissions on Ceded Lands.

Some question was raised in the court below whether the lands ceded to the United States by the first section of the treaty, Indian Treaties 1873, p. 585, article 1, lines 26187 to 26201, can be regarded as trust lands, or were public lands of the United States. The terms of the treaty clearly establish a trusteeship on the part of the United States to sell these lands and dispose of the proceeds in a certain way specifically provided in the agreement.

And of these proceeds the United States were not to receive one dollar of benefit. It was provided that "said lands shall be sold as public lands are surveyed and sold under existing laws," not as *other* public lands are sur-

veyed and sold, which is the usual language used in opening military and Indian reservations to settlement. Again, "no pre-emption claim or homestead settlement shall be recognized," neither were they to be sold at public auction, nor could they be acquired by bounty or military land warrants or under the timber culture act, which are the several methods of acquiring title to public lands.

"The words 'public lands,' used in our legislation, mean such as are subject to sale or other disposal under general laws." (*Newhall* v. *Sanger*, 92 U. S. 761).

In the case of *Leavenworth, Lawrence and Galveston Railroad Company* v. *United States* (92 U. S. 733) the status of these Osage lands is fully considered.

The court says:

"The legislation which reserved them for any purpose excluded them from disposal in the manner that the public lands are usually disposed of."

Again the court quotes from the case of *Wilcox* v. *Jackson* (13 Pet. 498) as follows:

"We go further and say that whenever a tract of land shall have been once legally appropriated to any purpose, from that moment the land thus appropriated becomes severed from the mass of public lands, and that no subsequent law, proclamation or sale would be construed to embrace or operate upon it, although no reservation were made of it."

The court continues:

"By the first article the Osages ceded to the United States a large and valuable part of their possessions on certain conditions to be performed by the United States. They were required to survey and sell it on the most advantageous terms for cash in conformity with the system then in operation for surveying and selling the public

lands, with the modification that neither pre-emption claims nor homestead settlements were to be recognized. And the proceeds of these sales, after deducting enough to repay large advances and expenses, were to be placed in the Treasury to the credit of the civilization fund, for the benefit of the Indian tribes throughout the country.

"The fund arising from the sale of the lands ceded by the second article was for the exclusive benefit of the Osages, but the relation of the United States to the property in each case is the same. And it can make no difference that the trust in one is specifically declared, and in the other is to be ascertained from the general scope of the language. It is an elementary principle that no particular form of words is necessary to create a trust. In neither case is the Government a beneficiary. In both, the money is to be applied to promote the well-being of the Indians, an object which it has been the favorite policy of Congress to promote."

It was ably but unsuccessfully urged by the Attorney-General in the *Brindle* case (Brief for United States, No. 216, October Term, 1883, p. 19):

"The terms of cession were absolute, and without condition precedent, except as to a particular tract mentioned in article 3 of the treaty with the Delawares of May 6, 1854.

"By these treaties the Indian title to said lands vested immediately, and, except as to the tract mentioned in said article 3, unreservedly in the United States.

"By the fulfillment by the United States of the condition mentioned in said article 3, the Indian title to the particular tract mentioned in said article was also finally extinguished.

"Said treaties provided that the ceded lands should be surveyed and sold in a particular manner, and that the net proceeds thereof should be applied in a particular manner to the benefit of said Indians."

But this argument was answered by this court (p. 693): "The cessions to the United States were in trust, to sur-

vey, manage and sell the lands and pay the net proceeds to or invest them for the Indians." The same is true in this case.

From the foregoing we are justified in the conclusion:

1. That "the treaty of 1825 secured to the Osages the possession and use of their lands as long as they may choose to occupy the same." "This right of occupancy has been held to be as sacred as the title of the United States to the fee." (*L. L. & G. R. R.* v. *U. S.*, 92 U. S. 733).

2. That the Government relinquished all reversionary right by the treaty of September 29, 1865, by providing for their sale, the proceeds of which were for the exclusive use of the Indians.

3. That the Government was charged with the trust of surveying and selling said lands and placing in the Treasury of the United States the money received from such sale, less the cost of survey and sale.

4. That by the terms of the original grant of these lands to the Indians and subsequent treaty providing for their sale for their benefit, both classes of these lands became the private lands of the Indians and ceased to be public lands.

Services Outside of Statutory Duties.

In the case at bar the question is:

"Was claimant justly, legally, or equitably entitled to additional compensation for selling a certain part of these lands while performing his duties as register of the land office in assisting in the disposal of the public lands?"

The duties of a register of a land office refer exclusively to disposing of the public lands of the United States. There was not one sentence or one word in all the legislation relating to any officers charged with duties pertaining to the disposal of the public lands that could in

any manner be legally construed to require him to assist in disposing of private lands prior to the act of January 27, 1898.

The General Land Office and local land offices were established for the exclusive purpose of executing laws relating to the public lands.

"There shall be appointed by the President, by and with the advice and consent of the Senate, a register of the land office and a receiver of public moneys for each land district established by law." (R. S. 2234.)

"Every register and receiver shall be allowed an annual salary of five hundred dollars." (R. S. 2237.)

"Registers and receivers, in addition to their salaries shall be allowed each the following fees and commissions." (R. S. 2235.) The fees and commissions enumerated and allowed relate entirely to the public lands, and they were only charged with such duty until January 27, 1898 (30 Stats. 234), when they were further charged with the duties of assisting to dispose of Indian lands as follows:

"*Be it enacted*, etc., That section twenty-two hundred and thirty-four of the Revised Statutes of the United States is hereby amended so as to read as follows:

"Section 2234. There shall be appointed by the President, by and with the advice and consent of the Senate, a register of the land office and a receiver of public moneys for each land office established by law, who shall have charge of and attend to the sale of public and Indian lands within their respective districts, as provided by law and official regulations, and receivers shall be accountable under their official bonds for the proceeds of such sales and for all fees, commissions or other moneys received by them under any provision of law or official regulations."

This is certainly conclusive that it was not a part of the duties of the registers and receivers under the law, to

assist in the disposal of the Indian lands prior to the date of this act, for, otherwise, there would be no necessity for this amendment. The intent and purpose of Congress is clearly shown and this becomes final.

In the case of *United States* v. *Macdaniel*, 7 Pet. 1, it was held:

"That the duties in question were discharged by the defendant during office hours can form no objection to the compensation claimed. They were required of him by the head of the Department and being a subordinate he had no discretion to decline the labor and responsibility thus imposed. But seeing that his responsibility would be greatly increased, and perhaps his labor, the Secretary of the Navy increases his compensation, as in justice he was bound to do.

"In discharging the ordinary duties of clerk, the compensation of the defendant was fixed as fourteen hundred dollars; but when the duties of agent for Navy disbursements were superadded to those of clerk, there is an adequate augmentation of pay given to him. Is there anything unreasonable or unjust in this?

"But it is said there was no law authorizing such an officer to be appointed.

"That the duties performed by the defendant were necessary for the public service has not been denied; nor is it pretended that the commissions allowed him were higher than the amount paid for similar service elsewhere. The payments by him were legal and being made under the immediate direction of the Secretary of the Navy errors were avoided which might have occurred under other circumstances.

"It must be admitted that there was no law authorizing the appointment of the defendant, nor was it considered necessary that there should be a special statutory provision on the subject. For the convenience of the officers of the Navy and others who were engaged in the service of the Department, certain disbursements became necessary; and as no law specially authorized the appointment of an agent for this purpose, they were required to be made by a clerk."

By substituting claimant for defendant in the above case last cited, we have every principle adjudged for which claimant contends. It is not important that claimant performed this service during office hours; "They were required of him by the head of the Department," and in the case at bar Congress provided for compensation, but it was, in effect, overruled by the Commissioner of the General Land Office. In fixing the maximum salary at $3,000 (Rev. Stat. Secs. 2240, 2241) Congress had in view only his services for disposing of the public lands, the only service contemplated, but when the duties of selling the private lands of Indians "were superadded" to those of disposing of the public lands, there should be "an adequate augmentation of pay given him." "Is there anything unreasonable or unjust in this?" The law authorized claimant's employment. His duties were necessary for the public service; he only asks compensation upon the basis "for similar service elsewhere."

Payment of Expenses Required by Treaty.

The treaty itself provided for such compensation. Article 1 providing for the sale of the "ceded lands," stipulated that "after reimbursing the United States the cost of said survey and sale * * * the proceeds of sale shall be placed in the Treasury of the United States to the credit of the civilization fund."

Article 2, as to the "trust lands" provides:

"The proceeds of sale, as they accrue, after deducting all expenses incident to proper execution of the trust, shall be placed in the Treasury of the United States to the credit of said tribe of Indians."

Article 16 as to the "Osage diminished reserve lands" provides:

"The diminished reservation shall be disposed of by the United States in the same manner and for the same purposes as hereinbefore provided in relation to the trust lands."

The "cost of survey" was paid by direct appropriation to fulfill contracts and the only "cost of sale" that was or could be incurred was compensation to the registers and receivers.

It was said by the Supreme Court of provisions in the same form in the *Brindle* case (110 U. S. 693):

"This clearly implied the payment of a reasonable compensation for the services of those employed to carry the trust into effect."

The First Controller of the Treasury decided July 6, 1881, that no fees or commissions could be paid to registers or receivers out of the proceeds of sale of these lands in the absence of an appropriation. (2 Lawrence, 369.)

The Second Controller of the Treasury decided December 4, 1886, that the fees of one dollar provided by the first paragraph of section 2238 of the Revised Statutes as a fee for the register can not be regarded as a part of the proceeds of the sales of the lands, but are in the nature of a tax imposed by the United States upon persons purchasing the land for the purpose of imdemnifying the Government for the expense of maintaining such service, and that they must be credited in making up the expense account of the United States, and that only the net expenses remaining after applying these fees can be charged to the Osage Nation and deducted from the proceeds of the sale of their lands. (Digest 2d Cont. Dec. Vol. 3; Secs. 722, 723, pp. 186, 187.)

As the filing fees exceeded the expense to which the United States had been put, no charge for expense in the

sale of these lands has ever been made against the Osage Indians (Sen. Doc. 33, 57th Cong. 2d Sess. p. 3).

The provisions of these three articles of the treaty, therefore, requiring the expenses of the sale to be charged against the proceeds have never been carried out. The payment of a reasonable compensation to officers employed to make the sales is therefore not merely an implication arising out of the treaty as the Supreme Court said in the *Brindle* case, but is the only expense to which the requirements of the treaty can possibly have any application.

Presumptions in Favor of Officer.

Every presumption must be in favor of the payment of the officers performing this additional work out of the funds of the Indians for whose benefit the work was performed. It is not to be presumed that the treaty-making power, while inserting in the treaty a provision for payment of the expenses of the sale, intended that the treaty funds should escape the payment of all such expenses through the operation of a provision for the payment into the Treasury of the excess of the emoluments earned by the land officers in the performance of the regular duties of their offices. Such a provision was intended to operate under very different circumstances from those of the present case. Its purpose was to save the money of the Government itself, not trust funds.

Justice Story, in *United States* v. *Bassett* (2 Story, 389, 24 Federal Cases, No. 14,539, pp. 1030, 1034), thus expressed the principle governing such cases:

"Such a mode of legislation so little supported by principles of justice or equity ought certainly not to be adopted, unless the legislature has spoken in the most clear and unambiguous terms. If there be any ground for real substantial doubt, as to the correctness of such an interpretation, that alone would seem to repel it; for

it is not in matters of doubt to be admitted that the legislature requires duties and services from a public officer, and yet intends to take from him the compensation which it has itself deemed a fit compensation therefor under ordinary circumstances. Besides, the act itself is restrictive of the right of the officers to all the fees and emoluments of their office, generally allowed by law, cutting down and limiting the compensation to a fixed maximum, and appropriating the residue to the public treasury. Now, in such cases, the general rule of interpretation is to give effect to the restriction and limitation only so far as the legislature has clearly and positively spoken, since it is in derogation of private rights otherwise vested in the incumbent in office. We can not, and we ought not, in such a case, to say, 'Voluit, sed non dixit,' for the intention can be fitly gathered only from the words, and therefore it is but just to say, 'Non voluit, quia non dixit.'"

And similar views were expressed by the same great magistrate in *United States* v. *Morse*, 3 Story, 87; 27 Fed. Cases, No. 15,820, pp. 1–3. He there said:

"The law, as I conceive, adjusts or intends to adjust, the measure of the compensation of every officer to the duties to be performed in that office, and not in another independent office."

And in much the same line of reasoning this court held in *United States* v. *Hill* (120 U. S. 169) that clerks of the Circuit and District courts were not required to account in their emolument returns for anything but taxable cost in suits between party and party, and that they were entitled in addition thereto to receive, irrespective of any maximum of emolument, the fees in proceedings under the naturalization laws and under the Shipping Commissioner's act, as well as the fees for the admission of attorneys to practice.

The present is a stronger case than either the *Bassett*, *Morse*, or *Hill* case for an exclusion of the charges for these special services from the requirement for an inclusion in the emolument return.

Amount of Compensation.

While the question of the amount of this additional compensation does not directly arise on this appeal, it may be remarked that the decision of this court in the *Brindle* case in fact allowed the officer his commissions at the rate of one per cent on all sales of Delaware Indian trust lands without regard to the maximum limit prescribed by the statute upon sales of public lands.

In that case the very point made against the allowance of the claim was that the claimant had already received his full maximum compensation, all of which seems to have been paid out of Indian lands.

It was found (Brief for United States in the *Brindle* case, pp. 8, 9):

"That while the defendant was acting as special receiver of Delaware Indians trust-land moneys he received for the sale of such lands the sum of $467,749.19.

That commissions on said sum, at one per centum, would amount to the sum of . .	$4,677.49
That he was allowed for commissions on said sum	2,500.00
That he was disallowed the sum of	2,177.49
Which, with the sum of	142.27
makes	$2,319.76
That the interest on said sum of $2,319.76, from March 23, 1857, to June 13, 1879, makes the sum of	3,092.85
Making together the sum of	$5,412.61

15. That, while the defendant was acting as special receiver of Kaskaskia and Peoria, Piankeshaw and Wea Indians trust-moneys, he sold 208,656 30/100 acres of land, for which he received the sum of $347,852.74.

That the commissions on said sum, at one per centum, amounts to	$3,478.53
That he was allowed for commissions on said sales	2,500.00
That he was disallowed the sum of	978.53
That the interest on said sum so disallowed, from May 6, 1861, to June 13, 1879, amounts to	1,062.84
Making in all	$2,041.37

That the sum of	$978.53	
the amount so disallowed, deducted from the sum of	2,073.77	
Leaves the sum of		1,095.24
That the interest on this sum of $1,095.24 from May 6, 1861, to June 13, 1879, amounts to		1,189.61
Which together amounts to the sum of		$2,284.85."

The special verdict found (Brief for the United States, p. 13):

"G. If the court be of the opinion that the First Comptroller of the Treasury was the proper officer authorized by law to state the accounts of defendant as receiver of public moneys, and as acting disbursing agent, and that the Second Comptroller of the Treasury was the proper officer authorized by law to state the account of the defendant as special receiver of Indian trust moneys, and that the defendant is entitled to commissions on the sales of Indian trust lands exceeding the sum of $2,500 for each sale of said lands, and that he is not entitled to military bounty-land-warrant fees exceeding $2,500 per year, including commissions on cash sales of public lands, then

the jury find for the defendant, and certify the amount due him to be the sum of $6,616.27
With interest to June 13, 1879, amounting to 7,925.51

Making in all . . . . . $14,541.78."

It was this paragraph of the special verdict which was approved and made the basis of the judgment. It expressly states that the defendant is entitled to the commissions on the sales of Indian trust lands "exceeding the sum of $2,500 for each sale of said lands," that is, exceeding the maximum limitation prescribed by Revised Statues, Sections 2240, 2241, on sales of regular public lands. This point, therefore, like the other objections, is clearly met by the decision in the *Brindle* case.

Conclusion.

The judgment of the Court of Claims should therefore be reversed and the cause remanded with directions to give judgment in favor of the appellant for such an amount as would constitute a reasonable compensation for his services in the disposition and sale of these Indian trust lands.

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No. 256.

In the Supreme Court of the United States.

OCTOBER TERM, 1906.

WATSON STEWART, APPELLANT,

v.

THE UNITED STATES AND THE OSAGE NATION OF INDIANS.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

J. A. VAN ORSDEL,
Assistant Attorney-General.

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APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

The claimant, Watson Stewart, was, on May 12, 1869, duly appointed and commissioned register of the United States land office at Humboldt, in the State of Kansas, and served continuously from said date until November 20, 1871.

Under a treaty between the United States and the Osage Indians, made September 29, 1865, and ratified by the President January 21, 1867, the lands in the State of Kansas belonging to said Indians were ceded to the United States and afterwards sold by the United States in accordance with the terms provided in said treaty. (Record, p. 2.) Appropriate legislation was passed by Congress to carry into

effect the terms of the treaty and the Secretary of the Interior issued his instructions governing the sale of said lands to the register and receiver of the land office at Humboldt, Kans. (Record, pp. 7 and 8.) On March 28 and 31, 1871, further instructions were issued to the registers and receivers concerning the sale of lands contained in the "diminished reservation," which were authorized to be sold by the act of July 15, 1870, in conformity with section 16 of the treaty. (Record, pp. 9 and 10.)

The compensation for registers of the United States land office at that time consisted: First, of an annual salary of $500; second, a fee of $1 for each declaratory statement; and third, a commission of 1 per cent on all moneys received at each receiver's office. There was the further provision which is now found in section 2240, Revised Statutes, as follows:

> The compensation of registers and receivers, including salary, fees, and commissions, shall in no case exceed in the aggregate $3,000 a year each, and no register shall receive for any one quarter or fractional quarter more than a pro rata allowance of such maximum.

The maximum compensation of $3,000 per annum was duly paid by the United States to the claimant. (Record, p. 10.)

The act of March 3, 1903, conferred jurisdiction upon the Court of Claims to hear and determine the claim of registers and receivers of the United States land office in the State of Kansas, who were charged with the disposal of Osage ceded, Osage

trust, and Osage diminished reserved land in said State. (Record, p. 1.) Under this act, the claimant filed his petition praying for judgment in the sum of $23,104.44, as commission on sales of said Osage ceded land, Osage trust, and diminished reserved lands. (Record, pp. 4 and 5.) The cause was heard and determined by the court below March 21, 1904, and judgment ordered to be entered dismissing claimant's petition. (Record, p. 15.)

THE ISSUES.

Claimant contends:

First. That the services performed by him in connection with the sale and disposition of said lands were not within the line of his duty as register of the land office.

Second. That he is entitled to recover fees and commissions for said services beyond the maximum compensation of $3,000 per annum provided for registers of the General Land Office.

The Government's contention is:

First. The statute fixed the compensation of registers, the maximum amount of which was $3,000 per annum, and the services performed by claimant in connection with the sale of said lands were within the line of his duty as register of the United States land office.

Second. That the services rendered by claimant were in and by virtue of an express contract between the claimant and the United States, which contract

has been fully executed and performed and, therefore there is no implied contract or quantum meruit upon which to base an action for recovery.

ARGUMENT.

The petition, in referring to claimant's duties, alleges, "His duties as register of the said land office were prescribed and defined by the statutes of the United States and consisted of services in the disposal of public lands of the United States." (See par. 3, record, p. 2.)

Again quoting from the petition:

> Said Osage ceded and Osage trust and diminished reserve lands were not public lands of the United States, but were private lands belonging to the Osage tribe of Indians, and it was no part of the duty of the claimant as register of a United States land office to assist in disposing of said Osage ceded and Osage trust and diminished reserve lands. (Par. 5, record, p. 2.)

A large area of these lands were, by article 1 of the treaty, granted and sold to the United States, and in consideration of said grant and sale the United States agreed to and did pay the sum of $300,000 to said Osage tribe of Indians.

Article 1 of the treaty provides that "the tribe of the Great and Little Osage Indians * * * do hereby grant and sell to the United States the lands contained within the following boundaries * * *. And in consideration of the grant and sale to them

of the above described lands, the United States agrees to pay the sum of $300,000, which sum shall be placed to the credit of said tribe of Indians in the Treasury of the United States."

Here, then, is an absolute provision whereby the *United States became the owner in fee of the lands set forth in article 1 of the treaty, and, therefore, they were public lands of the United States and at the time they were sold and disposed of by the United States were not private lands belonging to the Osage tribe of Indians, as alleged in said petition.* These lands described in article 1 of the treaty have been termed "Osage ceded lands."

Article 2 of the treaty provides that "the said tribe of Indians also hereby cede to the United States a tract of land 20 miles in width from north to south, off the north side of the remainder of their present reservation and extending its entire length from east to west; which land is to be held in trust for said Indians and to be surveyed and sold for their benefit by the Secretary of the Interior, under such rules and regulations as he may from time to time prescribe, under the direction of the Commissioner of the General Land Office, as other lands are surveyed and sold." (See treaty with the Osage Indians, 14 Stat. L., pp. 687–688.)

These last described lands have been termed "Osage trust lands." The proceeds of the sales of said Osage trust lands by the terms of the treaty were placed in the Treasury of the United States to the credit of said tribe of Indians, excepting that cer-

tain percentage of the net proceeds were to be placed to the credit of the school fund of said Indians.

Article 16 of said treaty provided that should the Indians agree to remove from the State of Kansas and settle on lands in Indian Territory provided for them by the United States "then the diminished reservation" shall be disposed of by the United States in the same manner and for the same purpose as hereinbefore provided in relation to said trust lands.

Notwithstanding that article 2 of the treaty provides that the lands therein described shall be held in trust, they were nevertheless ceded to the United States and became subject to its disposal in accordance with the terms of the treaty as other lands of the United States were disposed of and sold. The disposition of the "diminished reserved lands" follow the same rule, and became such lands in the disposition of which registers and receivers were required to perform the same duties as in the disposition of other lands belonging to the Government.

The Osage ceded lands described in the first article of the treaty became absolutely the property of the United States and were to be disposed of as follows:

> Said lands shall be surveyed and sold under the direction of the Secretary of the Interior, on the most advantageous terms for cash, as public lands are surveyed and sold under existing laws, but no preemption claim or homestead settlement shall be recognized.

Furthermore, as to the Osage trust lands article 2 of the treaty provided that the lands should be

sold by the Secretary of the Interior under such rules and regulations as he may from time to time prescribe under the direction of the Commissioner of the General Land Office as other lands are surveyed and sold. While as to the Osage "diminished reservation," article 16 of the treaty provided that the lands should be disposed of in the same manner as the Osage trust lands.

The Secretary of the Interior being charged, under the terms of the treaty, with the disposition and sale of these lands the same as public lands of the United States, undoubtedly had the authority to use the same machinery in the disposition of the lands that was required in the sale and disposition of the public domain, and the register and receiver being part of that machinery acted in their official capacity, and therefore the claimant is not entitled to additional fees and commission beyond the maximum compensation of $3,000 per annum provided by law.

The services were rendered under and by virtue of an express contract entered into between the claimant and the defendant, which has been fully executed and performed by both parties; hence no implied contract or quantum meruit can exist.

The contract between the claimant and the United States were letters of authorization and the acceptance of the terms contained therein. The terms were as follows:

> The register and receiver will be allowed a commission of 1 per cent on the proceeds of

> the sale of these lands, with limitation, as a matter of course, to the legal maximum of $2,500, inclusive of commissions, fees, etc., on the disposal of the public lands, the payment of which is to be made by the receiver in his capacity of disbursing agent, and to be debited in a special account, together with such other expenses incident to the sale of the lands alluded to as may be authorized by law and instructions. (See record, p. 9.)

And again:

> Nothing, however, shall be herein construed as authorizing the register and receiver to receive more than the maximum fees and commissions of $2,500 per annum now allowed by law, and the receiver in adjusting his accounts shall take care to first ascertain how much short of the maximum the receipt from public lands, including the fees received from the declaratory statement on the Osage lands, will bring their fees and commissions, and will then charge to the Indian fund only so much commissions as will bring their compensation to the maximum. (Record, p. 10.)

The terms of this employment were duly accepted by the claimant, who, as the record shows, would not otherwise have received the maximum compensation, because of insufficient sales of strictly United States public lands to make up that amount in commissions. The terms having been accepted, the services were rendered under this contract of employment; the payments were made to the claimant under the contract of employment and were received by him without objection or without protest or with-

out claim for any additional or extra compensation. There being, then, an express contract of employment between the claimant and the defendant, fully executed upon both sides, it follows inevitably that there can not be an implied contract in the matter, and that the claimant can not recover from the Government upon a *quantum meruit*, unless it be first shown that the express contract was rescinded or abrogated by consent of the parties.

It is just as impossible to have an express contract and an implied contract coexisting concerning the same subject-matter at the same time as it is for two physical objects to occupy the same space at the same time. The ground of a legal implication is that the parties to the contract would have expressed that which the law implies had they known of it or had they not supposed it was unnecessary to speak of it because the law provided for it. But where the parties make express provisions the reason of the implication fails; and the law by implications will never overcome such express provisions made by the parties to the contract. (2 Parsons on Contracts, 8th ed., bot. p. 631. See also Texas Pacific case, 28 C. Cls. R., 379, 390.)

This doctrine is nowhere better stated than by this court in its decision in the case of *Hawkins* v. *United States* (96 U. S., 689). In that case Mr. Justice Clifford said:

> Two facts are the chief reliance of the claimant, to wit, (1) that the stone delivered is better than that which the claimant contracted to furnish; (2) that the United States

accepted the material and is now in full enjoyment of the same. Based on these facts, the proposition of the claimant is that he is entitled to recover the actual value of the materials, without reference to the contract price, which can not for a moment be admitted, as the findings show that the written contract was in full force and operation, no attempt having been made by either party to vary or rescind it, and that the claimant acted under it in furnishing and delivering the stone, and that the public authorities also, in adjusting his accounts and in making the payments referred to, conformed in all respects to its terms, stipulations, and conditions. * * *

Express stipulations can not in general be set aside or varied by implied promises; or, in other words, a promise is not implied where there is an express written contract, unless the express contract has been rescinded or abandoned, or has been varied by the consent of the parties. Hence, the rule is that if there be an express written contract between the parties, the plaintiff, in an action to recover for work and labor done, or for money paid, must declare upon the written agreement so long as the special agreement remains in force and unrescinded, as he can not under such circumstances recover upon a *quantum meruit.* (1 Story, Contr. (5th ed.), sec. 18; *Selway* v. *Fogg,* 5 Mees. and W., 83; *Creighton* v. *City of Toledo,* 18 Ohio St., 447; *Weston* v. *Davis,* 24 Me., 374; *Whiting* v. *Sullivan,* 7 Mass., 107; *Merrill* v. *The Ithaca and Owego Railroad Co.,* 16 Wend., 586; *Glacius et al.* v. *Black,* 50 N. Y., 145.) * * *

Implied promises or promises in law exist only when there is no express promise between the parties—*expressum facit cessare tacitum.* Hence, says Chitty, a party can not be bound by an implied promise when he has made an express contract as to the same subject-matter, which is certainly sound law, unless the express contract has been rescinded or abandoned. (Chitty, Contr. (10th ed.), 62; *Tousaint* v. *Martinnant*, 2 T. R., 100; *Cutler* v. *Powell*, 6 *id.*, 320; *Ferguson* v. *Carrington*, 9 B. and C., 59; *Atherton* v. *Dennett*, Law Rep., 7 Q. B., 327.) * * *

Jurisdiction is not conferred upon the Court of Claims to allow mere extra allowances in a case where there is no promise to that effect, either express or implied. Power to hear and determine claims founded upon any law of Congress, or upon any regulation of an Executive Department, or upon any contract, express or implied, with the Government of the United States, and all claims which may be referred to it by either House of Congress, is vested in the Court of Claims. Mere applications for extra allowance, unsupported by any contract, express or implied, must be made to Congress, where alone they can be properly entertained. (Rev. Stat., sec. 1059.)

The Brindle and Rogers cases.

The case of the *United States* v. *Brindle* (110 U. S., 688) cited by counsel has no application here. That was a case of the enforcement of implied assumpsit for work and labor done at the request of

the defendant and by it accepted and enjoyed without any express contract as to compensation. In that case the court said:

> When, therefore, Brindle was appointed special receiver and superintendent to assist the special commissioner in disposing of the trust lands, he was employed to render a service in no way connected with the office which he held. * * * In legal effect, the appointment was to an agency for the sale of lands for the Indians, *with an implied understanding* that a reasonable compensation would be paid for the services rendered. In so far as anything appears in the record, the appointment was not made because Brindle was receiver of the land office. The duties to be performed were of a different character and in a different place from those of the land office; *and while the exact amount of the compensation for this service was not fixed*, it was clearly to be inferred that such compensation as the law implies where labor is performed by one at the request of another—that is to say, a reasonable compensation—should be paid.

But there is a distinct line of demarcation between the foregoing facts and the case at bar.

Here the employment was made for the very reason that Stewart was register of a United States land office, and his compensation for the service was expressly stipulated in the contract of employment. There being, then, in the case at bar an express contract between the parties fully executed and per-

formed, there is, of course, no ground for implication of a different measure of compensation, and hence the Brindle case has no application.

Counsel for the claimants also cite the case of *United States* v. *Rogers* (81 Fed. R., 941), saying that it is even more directly in point than the case of Brindle. We think this case even less in point than that of Brindle. The Rogers case was an action by the United States against the sureties upon the bond of a receiver of the land office, and in which the court, applying the doctrine of *strictissimi juris*, held that, inasmuch as the reception of the funds arising from Indian lands was not a part of his official duties as the receiver of the land office, and was not a part of the funds for which the obligor on the bond had become liable to the United States for the safety thereof, therefore the surety upon the bond was not obligated to pay for any defalcation in such funds. Of course a surety upon the bond is only liable for the very identical thing that the bond calls for; and a complete defense to any suit against the surety upon a bond for the slightest deviation from the terms of the bond itself is *non hæc in fœdera veni*. In that case the surety upon the bond entered into an obligation to become responsible for the safe-keeping of funds arising from sales of the public lands of the United States. He did not enter into a bond to become surety for the safe-keeping of the proceeds of the sale of Indian lands, and hence, of course, the Government could not recover upon the bond.

The court below, in distinguishing the Brindle case from the case at bar, said:

> The case of Brindle (110 U. S., 688), upon which much reliance is placed by counsel for claimant, is easily distinguished from the case presented here. In that case it was said that, so far as anything appeared in the record then before the court, the appointment of Brindle was not made because he was receiver of the land office. In the present case no specific personal appointments were made, but the registers and receivers generally were designated to perform the service, and the duties were assigned to their respective offices without regard to the personal incumbents then existing. Claimant was not at the time of such designation and assignment of duties a register, but was appointed, and accepted such appointment, after the disposal of the ceded and trust lands had been attached to the office in which he qualified, and thereby obligated himself to perform all such duties as appertained thereto. The disposal of the diminished reserve lands was later included, but by continuing in the service claimant must be considered as having acquiesced in that action. Having voluntarily assumed to discharge all the duties of the office, he must be presumed to have known what the duties were and that the services for which he now seeks further compensation were engagements included in his acceptance of the office at the time he entered upon the performance of its duties, which is further evidenced by his continued

> service without objection, and for the designated compensation. In the present case the appointment of claimant to the office of register included the appointment to do the business appertaining to the sale of the identical lands in question, without special mention. (See record, pp. 14 and 15.)

Under the treaty these Osage lands were to be sold upon the most advantageous terms to the Indians, and under such rules and regulations as the Secretary of the Interior might from time to time establish. Now, one of the rules and regulations which the Secretary of the Interior did establish for the sale of these lands upon the most advantageous terms to the Indians, was that the same were to be taken charge of by the register and receiver of the United States public land office, and that no compensation was to be paid to such register and receiver other than an amount sufficient to make up the maximum compensation of the office as prescribed by law. It certainly can not be doubted that the Secretary of the Interior, under the aforesaid treaty stipulations, had full authority to make such a regulation.

We may concede that the claimant might have refused to accept the terms provided by the Secretary of the Interior, but the fact remains that he did accept the employment upon the conditions designated by the Secretary and probably did so because the sale of the strictly public lands of the United States were not sufficient to give him the maximum compensation fixed by law, and, therefore, there was ample consid-

eration for accepting the employment. Having accepted the employment under the terms and conditions provided by the Secretary, and having performed the duties under these terms and received payment therefor without objection or protest or claim for extra compensation, the claimant is bound by his contract and should not now be heard in his demand for additional compensation.

Quoting from the opinion of the court below—

> While the rules and regulations so prescribed by the Secretary of the Interior were in force the claimant accepted the appointment and qualified as register. He performed the services so required of him, and received the maximum compensation provided therefor by law and the regulations of the Secretary of the Interior without objection or protest, or claim for more compensation, so far as we discover in the record, until in February, 1902, thirty years after the last service was performed, when he initiated this claim in Congress, and by them it has been sent to this court for our determination. We are of the opinion that claimant voluntarily undertook to do, and did perform, the services described in his petition for the compensation he has already received, and that neither the United States nor the Osage Nation is liable to him for further compensation, nor did such liability exist at any time. (See opinion, record, p. 14.)

THE SECRETARY'S INSTRUCTIONS.

Under the heading "Department ruling not conclusive" (claimant's brief, p. 15), counsel says:

> Where officers of the Government in good faith comply with such rulings of their superior officers, they lose no rights by so doing. They are not bound to put themselves in the position of contentious and disobedient officers. Their compliance with their instructions, so far from constituting an agreement to a contract, express or implied, puts them in a position peculiarly favorable for the assertion of their rights in the courts in opposition to such rulings where the rulings are found to be erroneous.

For the purposes of this case we may concede every word of the foregoing doctrine, but here we meet the claimant with the fact that when these instructions of the Secretary of the Interior were first issued to the register and receiver of the land office in Kansas the claimant was not a register and that he was not appointed as such register until sometime after the first instructions were issued by the Secretary, and after a part of these Osage lands had been sold under such instructions. (Record, p. 15.) The claimant knew, or had the opportunity to know, just what his predecessor had been required to do and he entered upon his duties upon receiving his commission with the full understanding that he was to dispose of these lands under the instructions of the Secretary as given to the claimant's predecessor. These instructions

were supplemented by similar instructions after claimant's appointment. (See record, p. 9.) Therefore claimant was at liberty to refuse the appointment as register if he was not willing to accept the conditions concerning the sale of these Osage lands.

Furthermore, as shown in the record, the claimant never made the slightest protest or objection that he was not satisfied with the maximum compensation of $3,000 per annum. A protest by him could not be construed as insubordination or as rendering him amenable to the charge of being a "contentious or disobedient officer."

We have examined the various cases cited by claimant and without hesitation say they have no application to the case at bar.

EXPENDITURES SHOULD BE CHARGED AGAINST THE INDIAN FUND.

The special act under which this claim is prosecuted provides that any one or more of the registers and receivers of the United States land offices in the State of Kansas, upon whom was imposed the responsibility of making sale and disposal of the Osage lands, may bring suit in the Court of Claims against the Osage Nation and the United States to determine the claim for commissions or compensation connected with said sales. (Record, p. 1.)

The treaty provided, as seen by article 2, that the proceeds of such sales, after deducting all expenses incident to the proper execution of the trust, should be placed in the Treasury of the United States to the

credit of said tribe of Indians. The lands were duly sold by the United States and the proceeds deposited, as required by the treaty.

If, however, it shall now be determined that these registers and receivers, who are authorized to bring suit under this special act, are entitled to their filing fees and to a compensation of 1 per cent of the proceeds of these sales beyond the maximum amount of $3,000 per annum, it can not be doubted but that such expenditure must be considered a part of the cost of the sale of the lands, and hence should be charged against the Indian fund and not paid out of the public treasury.

It is confidently submitted that there is no cause of action presented in the petition, and that for the foregoing reasons, supplementing the forceful opinion by Judge Wright, we contend that the judgment should be affirmed. Any further discussion of the issues involved would be a matter of weariness to the court.

Respectfully submitted.

J. A. VAN ORSDEL,
Assistant Attorney-General.

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(20,199.)

IN THE

Supreme Court of the United States.

October Term, 1906.

No. 256.

WATSON STEWART, *Appellant*,

v.

THE UNITED STATES AND THE OSAGE NATION OF INDIANS.

BRIEF ON BEHALF OF THE OSAGE NATION,

ONE OF THE APPELLEES.

LORENZO A. BAILEY,
Attorney for THE OSAGE NATION.

(20,199.)

IN THE

Supreme Court of the United States.

October Term, 1906.

No. 256.

WATSON STEWART, *Appellant*,

v.

THE UNITED STATES AND THE OSAGE NATION OF INDIANS.

Brief on Behalf of THE OSAGE NATION, one of the Appellees.

STATEMENT OF THE CASE.

In 1865 the United States sought to obtain and open up for settlement the lands then occupied by the Osage Nation in the State of Kansas. This was the definite purpose of the United States in entering into the treaty of September 29, 1865 (14 S. L., 687), with the Osages.

By Articles I, II and XVI of the treaty all said lands were divided into three parts, which are designated, respectively, ceded lands, trust lands and diminished reserve lands; all which the United States thereby received in trust with power of sale; the Osages, however, reserving the right to remain in possession of the diminished reserve lands until a new home should be provided for them by the purchase of lands in Indian Territory, to be paid for out of the proceeds of the

sale of the Kansas lands. Such new home was accordingly so provided for them and paid for.

The general effect of the treaty was to convey the lands to the United States, in trust, and to require the United States to survey and sell the lands; to pay the expense of such survey and sale and all expense incident to the proper execution of the trust and look to the proceeds of sale for reimbursement; to place $300,000, together with the net proceeds of the sale of the trust and diminished reserve lands, in the Treasury as a trust fund, to the credit of the Osages, out of which the price of their new home in Indian Territory was to be paid; and to pay the Osages interest at the rate of five per centum per annum on the remainder of said trust fund.

The treaty was ratified January 21, 1867, and immediately thereafter the United States proceeded to make the survey and sale in the manner and by the means therein expressly provided, to wit: as the public lands were surveyed and sold, and under the direction of the same officers of the Government who were by law charged with the duty of directing the survey and sale of the public lands.

The registers and receivers of the land office in the State of Kansas were duly instructed to perform in reference to these lands situated in their respective land districts the same services which by law they were required to perform in and about the sale of public lands, and were also duly instructed that their entire compensation for all such services, including those rendered in the sale of the Osage lands as well as in the sale of the public lands, was limited to the legal maximum. These instructions, as to the ceded and trust lands, were issued November 23 and December 19, 1867, by the General Land Office, by authority of the Secretary of the Interior; copies of such instructions being then sent to the register and receiver at Humboldt, Kansas (R., 7, 8).

Thereafter, while said instructions were in full force,

Watson Stewart, the appellant, was appointed register of the United States Land Office at Humboldt, Kansas, and on May 12, 1869, entered upon, and thereafter until November 20, 1871 (R., 7), continued to perform the duties of such register, as well in reference to the public lands as also in reference to the Osage lands situate within his land district, without protest or objection on his part and without any notice or intimation to any one that he would not accept the terms of compensation stated in said instructions or that he would claim or expect any other or further compensation.

On March 28, 1871, during his term of office, the appellant and the other registers and receivers in Kansas, were instructed by the General Land Office to proceed with the sale of the diminished reserve lands, subject to the same limitation as to compensation as stated in the instructions of November 23 and December 19, 1867 (R., 9).

During his entire term of service, from May 12, 1869, to November 20, 1871, for all his services in reference to the public lands and also the Osage lands, his earnings, including salary, fees and commissions, amounted in the aggregate to $23,652.09 and he was paid $7,863.07. For the entire period, his maximum compensation at the rate of $3,000 per annum as limited by law and by the instructions sent him by the General Land Office, amounted to $7,577.84. He was therefore overpaid $285.23 (R., 11, 12).

The Act of Congress approved March 3, 1903 (32 S. L., 1010), permitted any of said registers and receivers who were engaged in the sales of said Osage lands to bring suit in the Court of Claims against the Osage Nation and the United States to determine the claim of the plaintiff for commissions or compensation for the sale of said lands or any service or duty connected therewith. The Act conferred jurisdiction on that Court to hear and determine the suit and render judgment on the merits; permitted either party to appeal to this Court; required the Attorney General to

appear on behalf of both defendants, and also permitted the Osage Nation to appear by an attorney employed by it (R., 1).

Under said Act the appellant, on March 20, 1903, filed his petition in the Court of Claims, wherein the Attorney General on behalf of the United States filed a general traverse, and the Osage Nation by its attorney appeared and pleaded the general issue, not indebted; upon which pleadings and the evidence the court made findings of fact, and decided as a conclusion of law that the claimant was not entitled to recover and that his petition should be dismissed, and judgment was rendered and entered accordingly dismissing the petition; from which judgment the claimant appeals to this court (R., 6–16).

In the court below the Osage Nation, in its separate brief, denied any privity with the claimant, and contended that it was the duty of the United States, as trustee and guardian of the Osages, to protect them against greater expense in the sale of their lands than was incurred in the sale of public lands; that the waiver of the statutory bar to this suit was inoperative as to the Osages; and that, therefore, in case of judgment for the claimant, it must be against the United States alone and not against the Osage Nation. At the hearing, however, upon oral argument by counsel for the respective parties, it was conceded that this question was not then involved, and argument and consideration thereof were postponed to await the determination of the question of the claimant's right to recover. If such right shall be established, the Osages desire to be heard by counsel on the question so reserved.

The question involved on this appeal is presented by the claimant's contention in his petition (R., 2, 3) that his duties as register were prescribed and defined by the Statutes of the United States, and consisted of services in the disposal of the public lands of the United States; that while performing his duties as register of the United States Land Office at Humboldt, Kansas, the Secretary of the Interior,

through the Commissioner of the General Land Office, required him to perform, and he accordingly did perform, the further duty of assisting to dispose of the Osage ceded, trust and diminished reserve lands; that said lands were not public lands of the United States, but were private lands of the Osages, which it was no part of his duty as such register to assist in disposing of; that the reasonable value of his services in disposing of said Osage lands was the same as that provided by statute for the disposal of public lands, to wit: one dollar for each declaratory statement filed and a commission of one per centum on all moneys received at the receiver's office, amounting in all to $23,104.44, for which he prays judgment.

The Osage Nation, however, contends that by the terms of the treaty it became and was the duty of the United States, in disposing of the Osage lands, to utilize its established agencies concerning public lands, and that so far as concerned the right of registers and receivers to compensation for services concerning said Osage lands they should be regarded as public lands; or, on the other hand, if the claimant could not be required, as part of his statutory duties, to perform said services, then he is bound by the terms of the instructions under which he undertook to perform and did perform them.

Briefly stated, the main issue is whether or not the statutory limitation of the claimant's compensation as register is applicable to services rendered concerning said Osage lands, either by force of the statute or in consequence of his own act in performing said services under instructions fixing and limiting the amount of his compensation.

POINTS AND AUTHORITIES.

I.—JURISDICTION.

The Act of March 3, 1903, permitted the appellant to bring this suit to determine his claim and conferred jurisdiction upon the court "to hear and determine said cause

and to render judgment thereon on the merits." This was not intended to confer any extraordinary jurisdiction, but was merely a waiver of the statute of limitations. "On the merits" means in accordance with the law and the facts.

As stated in Hawkins *v.* U. S., 96 U. S., 698, "Mere applications for extra allowance, unsupported by any contract, express or implied, must be made to Congress, where alone they can be properly entertained."

The claimant accepts this view by resting his claim,—not upon an abstract notion of what would have been just under the circumstances, and without regard to statutory limitations or to the terms of his employment,—but upon the theory of an implied contract to pay him "the reasonable value" of the services rendered by him as register in compliance with the requirements of the Secretary of the Interior.

II.—The Brindle Case.

The claimant in his brief contends that in the case of U. S. *v.* Brindle, 110 U. S., 688, the right of registers and receivers to a reasonable compensation for the sale of Indian lands under treaties similar to the Osage treaty of 1865 was settled and adjudicated by this court.

This contention is wholly unfounded. The question in that case was not as to Brindle's right, as receiver, to compensation for the sale of such Indian lands, but was as to his right to reasonable compensation for services rendered by him, under special appointments, to assist the special commissioner in disposing of Indian trust lands at Fort Leavenworth and also at Paoli; he being at the same time receiver of public moneys for the district of lands subject to sale at Lecompton. His claim for compensation for services under the special appointments was opposed under the Act of August 31, 1852, 10 S. L., 100, Section 18, as follows: "No person hereafter who holds or shall hold any office under the Government of the United States whose salary or annual compensation shall amount to the sum of

two thousand five hundred dollars shall receive compensation for discharging the duties of any other office."

The court held that under the special appointments Brindle "was employed to render a service in no way connected with the office he held. He was not appointed to any office known to the law. No new duty was imposed on him as receiver of the land office." That disposed of the whole question. The Court in summing up said, "So far as anything appears in the record, the appointment was not made because Brindle was receiver of the land office. The duties to be performed were of a different character and at a different place from those of the land office, and while the exact amount of compensation for this service was not fixed, it was clearly to be inferred that such compensation as the law implies, where labor is performed by one at the request of another, that is to say, a reasonable compensation, would be paid. This case comes, therefore, within the rule in Converse *v.* United States (21 How., 463), and Brindle is not excluded by the Act of 1852 from demanding compensation for this service by reason of his being receiver of the Land Office."

In this case the facts are exactly the reverse of those in Brindle's case. Stewart received no special appointment. The service for which he claims pay was connected with his office as register at Humboldt. He was instructed to perform such service as a new duty to be performed by him as register, and of the same character and at the same place as the duties pertaining to his office of register. Furthermore, special provision was made and accepted by him concerning his compensation for such service, and he has been fully paid the compensation so provided to be paid.

III.—Duties of Register.

The United States undertook, by the terms of the treaty, which had the force of law, to make sale of the Osage lands in the same manner and by the same means as those em-

ployed in the sale of public lands. This brought the Osage lands under the management of the General Land Office, and imposed upon the registers and receivers the duty of aiding in the sale of these lands at their respective offices upon the same terms as those prescribed concerning the sale of public lands. That was the intent and legal effect of the treaty itself, and to that extent Congress, in approving the treaty, thereby added to and increased the official duties of registers and receivers and many other officers and employees of the Government.

The sale of the Osage lands was a part of the claimant's duty, either by force of law, as above stated, or else by his acceptance of the terms of his employment, as stated in the instructions from the General Land Office. In either event, he is bound by the statutory limitation fixing his maximum compensation.

He was allowed, for the additional duties, what he and the Commissioner of the General Land Office then considered an adequate augmentation of pay. Had he considered it inadequate, he had his remedy under the Act of August 18, 1856 (11 S. L., 91), which provides that in the settlement of accounts of registers and receivers of the public land offices, the Secretary of the Interior may allow, subject to the approval by Congress, reasonable compensation for additional clerical service and extraordinary expenses incident to said offices, as he shall think proper.

IV.—Express Contract; Estoppel.

The instructions of 1867 and 1871 fix and limit the amount of claimant's compensation.

Here was an express promise to pay a specified amount, which cannot be converted into an implied promise to pay any other amount.

Hawkins *v.* U. S., 96 U. S., 689.

An insurance agent who received the company's circular stating his commissions, and who acted on it and received

and adjusted his compensation by it, is estopped to deny that it was the measure of his compensation.

Stagg *v.* Conn. Mut. L. Ins. Co., 10 Wall., 589.

The claimant must confront this alternative: that he undertook the work upon the understanding either that he *was* bound, or else that he *was not* bound, by the terms of the instructions of 1867. In the former case he is estopped by that understanding. In the latter case he is estopped by his conduct, which was misleading, for had he then protested or asserted a claim for more than he was allowed and paid, the Government should and would have taken proper steps to protect itself and avoid an excessive expense in the execution of the trust.

Coleman *v.* U. S., 81 F. R., 824;
Gordon *v.* U. S., 31 C. Cl., 254;
U. S. *v.* Martin, 94 U. S., 400.

At the time of his appointment in 1869 the claimant knew the law provided a certain salary and fees and commissions for the services to be performed in and about the sale of public lands, but also fixed a maximum limit of his compensation quarterly. He then also knew that the instructions of 1867 fixed the rate and limit of his compensation for making the sale of the Osage lands. But he did not know at that time whether or not his earnings in making sale of public lands in every or any quarter would reach the maximum limit, and the opportunity to ensure the attainment of such maximum under the instructions of 1867 was a reasonable inducement and a sufficient consideration for the acceptance by him of the terms of the instructions of 1867 and of the later instructions of 1871.

During 1870 he earned and was paid his maximum by sales of public lands alone, but in 1869 and 1871 his earnings from that source did not reach the maximum limit, and he was allowed the difference to make up the maximum on account of his earnings in the sale of Osage lands.

His accounts were prepared, forwarded to the proper accounting officers of the Government, and settled, and the balances found due to him were paid, all in accordance with said instructions and without protest or objection from him.

The terms of the instructions are the terms of his employment and constitute an express contract binding on both parties; surely binding then and no less binding now, more than thirty years after the accounts were stated and closed.

V.—Implied Contract.

There is nothing in the case to support or create an implied contract.

The instructions made it very clear to the claimant what the Government expected of him and what it expected to pay him for his services.

An implied contract will not be raised contrary to the express declarations of the party sought to be charged, made at the time of the supposed undertaking.

Nutt *v.* Minor, 14 How., 474;
4 Cyc., 325, 326, and cases cited.

When a special contract has been fully executed according to its terms, and nothing remains to be done but the payment of the price, the plaintiff may sue on the contract, or in *indebitatus assumpsit* and rely upon the common counts, but "in either case the contract will determine the rights of the parties." The plaintiff "must produce the contract at the trial, and it will be applied as far as it can be traced."

Ingle *v.* Jones, 69 U. S., 2 Wall., 1.

To raise an implied assumpsit, the plaintiff must establish facts from which the duty to pay may reasonably be presumed.

Cary *v.* Curtis, 3 How., 236;
Fiedler *v.* Curtis, 2 Black, 461.

The facts are, that in the sale of public lands the United States limited a register's compensation to not exceed $3,000 per annum. The legislation on this subject was fully reviewed in U. S. *v.* Babbitt, 66 U. S., 1 Black, 55, at December Term, 1861. The policy announced in that decision was known to the parties to the treaty of 1865, and such knowledge affected their understanding and intent at that time, which must now be the guide. The Osages were then justified in the belief that the sales would be made at no greater cost than that fixed by the Government for the sale of public lands. That was also the understanding of the Government, as shown by the contemporaneous declarations of the Interior Department in the instructions of 1867.

Another fact is, that the claimant has been paid for his services, and accepted without protest what was agreed to be paid at the time.

There is no fact in the case upon which to predicate a claim that the United States or the Osage Nation is under any legal or moral duty to pay the claimant anything.

If the claimant is entitled to recover, why should not the officers and clerks and other employees of the Interior Department, whose labors were also increased by the same work concerning the sale of Osage lands, also receive extra compensation? and if so, where will the cost of the transaction end? Is it possible that the treaty contemplated such an expense? The claimant has, apparently, less right than they by reason of the express contract, limiting his compensation, contained in the instructions of 1867.

The opinion of the Court of Claims is adopted as part of this brief. The judgment of that court is right, and should be affirmed.

LORENZO A. BAILEY,
Attorney for the Osage Nation.

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IN THE

Supreme Court of the United States.

October Term, 1906.

No. 256.

WATSON STEWART, *Appellant*,

v.

THE UNITED STATES AND THE OSAGE NATION OF INDIANS.

Additional Brief on Behalf of the OSAGE NATION.

This brief is in reply to the proposition, contained in the brief for the United States (pp. 18, 19), that if the claimant recover, the amount should be charged against the Indian fund and not paid out of the public treasury.

As indicated in the brief for the Osages (p. 4) it was supposed that consideration of the secondary question of contingent liability, as between the defendants, was postponed to await the determination of the primary question as to the claimant's right to recover; but the Osages are invited by the Attorney General to meet the secondary issue now.

I.

This suit, in the language of the act of Congress conferring jurisdiction on the court, is "to determine the claim of the plaintiff;" the purpose being to determine which, if either, of the defendants is indebted to the plaintiff. It is

a suit, as at law, *in personam*; not, as in equity, to follow trust funds or opening up accounts between the United States as trustee and the Osage Nation as *cestui qui trust*.

No privity between the claimant and the Osage Nation is alleged or proven.

The cause of action is to recover the reasonable value of services rendered by the claimant at the special request of the United States.

In this transaction the United States had no authority from the Osage Nation to act as its agent. The relation between them was one of trust; not of agency.

A trustee who covenants in his own name, even with the addition of the words "as trustee," &c., will be liable personally. The addition is matter of description, not affecting the rights or remedies of the covenantee.

Duvall *v.* Craig, 2 Wheat., 45, 56.

Persons dealing with a trustee must look to him for payment of their demands and cannot resort to the trust estate.

Norton *v.* Phelps, 105 U. S., 393.

A trustee is personally bound by the contracts which he makes as trustee, even when designating himself as such, unless he stipulates that he is not to be personally responsible, but that the other party is to look solely to the trust estate.

Taylor *v.* Davis, 110 U. S., 330.

Therefore, if the claimant recover, the judgment must be against the United States and not against the Osage Nation.

II.

If, on the other hand, the court shall hold that Congress contemplated an equitable proceeding and shall sustain the claimant's contention for additional compensation, then the case should go back to the Court of Claims for the purpose

of a full accounting as between the defendants concerning the sale of the Kansas lands.

The aggregate amounts received by the United States, acting as trustee in this transaction, under the treaty, were as follows (R., 12):

From sales, ...	$10,663.318.28	
Filing fees, ...	139.166.00	
Total, ...		$10,802,484.28
The amount of the trust fund, as stated by the trustee, is		8,327,439.07
The difference, 23 per cent. of the total, is		$2,475,045.21

Out of the proceeds of the sale of the ceded lands, the trustee retained for the civilization fund, to meet a charge which rested primarily upon the United States and to carry out and enlarge the act of March 3, 1819 (3 S. L., 516), the sum of $755,162.01, and also retained all the filing fees, amounting to $139,166. These two items, amounting to $894.328.01, represent a clear profit to the trustee in this transaction.

By what right the Government has withheld from the Osages the filing fees, has not been explained; nor can the ordinary conscience approve the enforced contribution to the so-called civilization fund.

Furthermore, this suit was barred by the statute of limitations as against the United States, and the Osage Nation was immune from suit. If the United States see fit to remove the statutory bar, such waiver should not be construed to operate as in violation of the duty the Government owes as guardian, trustee and protector of the Osages. It may give away what is its own, but not that which is its ward's.

True, the treaty provided for payment of the expenses incident to the proper execution of the trust; but if the

court find for the claimant, such finding will not necessarily imply that the amount due him is an expense "incident to the proper execution of the trust." In such case, the Government will be in the position of a trustee claiming reimbursement for reasonable and proper expenses, and must show they were reasonable and proper.

In this connection, it is to be borne in mind that the terms of the treaty required the Government to utilize its established agencies for the sale of lands; that the Osages had a right to expect that the Government would not allow the expense to exceed that incurred in the sale of public lands.

It follows, therefore, that if the Government has failed to take the necessary measures to limit the cost of the sale of the Osage lands so as not to exceed the cost of the sale of public lands, or if it has been negligent in the performance of the trust or has made a profit on the trust transaction or has failed in any of its duties as trustee, it is in no position to seek the aid of the court in getting any further benefit or relief at the expense of the *cestui qui trust.*

As to the ceded lands, the United States, by the terms of the treaty, assumed the cost of survey and sale. As to the filing fees, the Government has never accounted as trustee. In no event could a recovery by the claimant as to the ceded lands and filing fees be charged against the Osage Nation.

As to the trust and diminished reserve lands, the Government should not be allowed to reopen stale claims, or waive any defenses, in violation of the trust created by the treaty, or to retain any profit by the trust transaction. If the claimant recover, the judgment should therefore be against the United States and not against the Osage Nation.

LORENZO A. BAILEY,
Attorney for the Osage Nation.

Supreme Court of the United States.

No. 256.—October Term, 1906.

Watson Stewart, Appellant,
vs.
The United States and the Osage Nation of Indians.
} Appeal from the Court of Claims.

[May 13, 1907.]

The appellant herein filed his petition in the Court of Claims to obtain compensation for services performed by him while a register of the United States land office at Humboldt, in the State of Kansas, during the time from May 12, 1869, until November 20, 1871.

His petition to recover for such services was filed in the Court of Claims pursuant to the provisions of section 13 of the Indian Appropriation Act, (chapter 994,) approved May 3, 1903, (32 Stat. 1010, 1011.) The section reads as follows:

"Sec. 13. That any one or more of the registers and receivers of the United States land offices in the State of Kansas upon whom was imposed the responsibility of making sale and disposal of the Osage ceded, Osage trust and Osage diminished reserve land in said State under the treaty of September twenty-ninth, eighteen hundred and sixty-five, between the United States and the Osage Indians, and the acts of Congress for carrying said treaty into effect, may bring suit in the Court of Claims against the Osage Nation and the United States to determine the claim of the plaintiff or plaintiffs for commissions or compensation for the sale of said lands or any service or duty connected therewith. And the said court shall have jurisdiction to hear and determine said cause and to render judgment thereon on the merits; and the Attorney General shall appear on behalf of the United States and the Osage Nation, and either party feeling aggrieved at the decision of the Court of Claims may appeal to the Supreme Court of the United States, and the final judgment in such case shall determine the rights of all such registers and receivers similarly situated. Said Osage Nation may also appear in said suit by an attorney employed with the authority of said nation. The Court of Claims shall have full authority, by proper orders and process, to make parties to any such suit all persons whose presence in the litigation it may deem necessary or proper to the final determination of the matter in controversy."

The petition was dismissed on its merits by the Court of Claims, (39 Ct. Cl. 321,) and from such dismissal the appellant was allowed an appeal to this court. The following facts were found by the court:

The United States and the Great and Little Osage Indians entered into a treaty September 29, 1865, which was proclaimed January 21, 1867. (14 Stat. 687.) In the first article it was stated that the tribe of the Great and Little Osage Indians, having more land than was necessary for their occupation, and all payments by the Government to them under former treaties having ceased, leaving them greatly impoverished, and being desirous of improving their condition by disposing of their surplus land, they therefore granted and sold to the United States the lands described in that article, and in consideration of the grant and sale to them of such lands the United States agreed to pay the Indians the sum of three hundred thousand dollars, which sum was to be placed to the credit of such Indians and interest thereon paid. The lands were to be surveyed and sold, under the direction of the Secretary of the Interior, on the most advantageous terms, for cash, as public lands are surveyed and sold under existing laws, and after reimbursing the United States for the cost of such survey and sale and the said sum of three hundred thousand dollars advanced to the Indians the remaining proceeds of sales were to be placed in the Treasury of the United States to the credit of the "civilization fund," to be used under the direction of the Secretary of the Interior.

By article 2 of the treaty the Indians also ceded to the United States the tract of land therein described, in trust for the Indians, to be surveyed and sold for their benefit by the Secretary of the Interior under such rules and regulations as he might from time to time prescribe, under the direction of the Commissioner of the General Land Office, as other lands are surveyed and sold. Provision was then made in the article for the proceeds arising from the sale.

By article 16 it was provided that if the Indians should remove from the State of Kansas and settle upon lands to be provided for them by the United States in the Indian Territory on terms to be agreed upon, then the diminished reservation should be disposed of by the United States in the same manner and for the same purposes as thereinbefore provided in relation to said trust lands, with exceptions not material to be noticed. (The Indians did subsequently remove from Kansas.)

It was also provided by the thirteenth article that, as the Indians had no annuities from which the expenses for carrying the treaty into effect could be taken, the United States should appropriate twenty thousand dollars, or so much thereof as might be necessary, for the purpose of surveying and selling the land thereby ceded in trust, which amount so expended was to be reimbursed to the Treasury of the United States from the proceeds of the first sales of the lands.

On the 23d of November and again on the 19th of December, 1867, the Commissioner of the General Land Office, by authority of the Secretary

of the Interior, issued instructions to the registers and receivers in the State of Kansas for the rendition of services in the sale of land ceded to the United States by article 1 of the treaty above mentioned, and the lands agreed to be held in trust by the United States and surveyed and sold for the benefit of the said Indians by article 2 of that treaty. Among other instructions, under date of December 19, 1867, it was provided that the registers and receivers were to be "allowed a commission of one per cent each on the proceeds of the sales of these lands, with limitations, as a matter of course, to the legal maximum of $2,500, inclusive of commissions and fees, &c., on the disposal of the public lands, the payment of which is to be made by the receiver, in his capacity of disbursing agent, and to be debited in a special account, together with such other expenses incident to the sale of the lands alluded to as may be authorized by law and instructions."

On the 28th of March, 1871, further instructions were given in regard to the performance of services, in which was the further statement that "nothing, however, shall be herein construed as authorizing the register and receiver to receive more than the maximum of $2,500 per annum, now allowed by law, and the receiver in adjusting his accounts will take care to first ascertain how much short of the maximum the receipt from public lands, including the fees received from declaratory statements on the Osage lands, will bring their fees and commissions, and will then charge to the Indian fund only so much commissions as will bring their compensation to the maximum." In accordance with these instructions claimant performed services in the sale of lands ceded by the Osage Indians under article 1, and of lands held in trust by the United States under article 2 of the treaty, and of lands included within the diminished reservation of the Indians under article 16 of the treaty.

The claimant was paid for each year of his service the full maximum amount due him, in accordance with the instructions from the General Land Office. This full maximum would not in some cases have been reached without resort to the sales of land under the treaty. This suit has been brought by claimant to recover a commission of one per cent on the amount of the sales of the land, and the filing fees on the lands mentioned in the treaty and now in the Treasury, as a reasonable compensation for his services in the sale of these lands as outside of and in addition to his regular official duties in the sale of public lands.

The total amount received on the sale of Osage ceded lands was $1,055,162.01; and the total amount received on sale of Osage trust and diminished reserve lands was $9,608,156.27; and the total amount of money held in trust by the Government for said Osage Indians under said treaty

of September 29, 1865, is $8,327,439.07, on which interest at five per cent is paid by the United States, amounting annually to $416,371.95.

Mr. Justice PECKHAM, after making the foregoing statement, delivered the opinion of the Court.

Except for the treaty between the United States and the Osage Indians, relative to the lands in question, and the passage of appropriate legislation by the United States, the lands would never have been sold, as they were not public lands of the United States for the sale of which Congress had already provided under its general legislation. The treaty, however, provided that the lands described in article 1 were to be surveyed and sold under the direction of the Secretary of the Interior on the most advantageous terms, for cash, as public lands are surveyed and sold under existing laws; and under article 2 the lands were to be sold for the benefit of the Indians by the Secretary of the Interior, under such rules and regulations as he might from time to time prescribe, under the direction of the Commissioner of the General Land Office, as other lands are surveyed and sold; and under article 16, in case of the removal of the Indians, the diminished reserve was to be disposed of by the United States in the same manner and for the same purposes as provided in relation to the so-called trust lands. Thus power was given to the Secretary of the Interior, acting through the Commissioner of Public Lands, to make the same rules and regulations for the sale of the treaty lands as applied to the survey and sale of "public lands," and to that end he had power to provide for their sale by the various receivers and registers of the land office in the State of Kansas, in whose jurisdiction such lands lay. Although the treaty provided the sum of $20,000 to pay the expense of carrying out its provisions, yet it is evident that the purpose of the treaty was that these lands should be sold at the least expense to the Indians in their sale, and we think that the Secretary of the Interior, acting through the Commissioner of the General Land Office, had the right to provide, as was done in this case, that the various registers and receivers should sell the lands and should not receive more than the maximum compensation for their services per annum otherwise allowed by law. In cases where the maximum amount would not be received without resorting to the treaty fund, such resort was permitted, and the fund was in fact resorted to in this case in order to reach the maximum for the fractional years of claimant's service. The Secretary of the Interior having made this rule, and the instructions of December 19, 1867, being in existence when the claimant herein received his appointment as register, he took it subject to the provision that his maximum compensation for all services rendered should not exceed the sum named by law. See sections 2237, 2238, 2240 and 2241, U. S.

Rev. Stat. prescribing among other things, the compensation of registers and receivers. This compensation the claimant was paid thirty years since, without objection or protest from him that he was entitled to any further payment on account of services in the sales of these treaty lands.

The case of *United States* v. *Brindle*, (110 U. S. 688,) does not aid claimant. In that case Brindle was, on the 28th day of October, 1856, "duly appointed special receiver and superintendent to assist the special commissioner to dispose of the Delaware Indian trust lands at Fort Leavenworth, in the Territory of Kansas, under the treaty with the Delaware tribe of Indians. On the 18th of February, 1857, he was appointed and commissioned for four years as receiver of public moneys for the district of lands subject to sale at Lecompton, Kansas, and on the 15th day of May, 1857, he was duly appointed as special receiver and superintendent to assist the special commissioner to dispose of the trust lands of the Kaskaskia and Peoria, Piankeshaw and Wea Indians, confederated tribes of Indians at Paoli, Kansas Territory." Brindle was thus appointed special receiver and superintendent of the Delaware Indian trust lands before he was made receiver of public money, and while he was receiver of public money he was duly appointed as special receiver of the other Indian tribes, as above stated. The duties of the positions (special receiver, &c., and receiver of the public moneys) were thus kept separate and apart. As receiver he was to receive public moneys for land subject to sale at Lecompton, Kansas, while his duties in regard to the other positions to which he had been specially appointed referred to the disposition of the Indian lands, in one case at Fort Leavenworth and in the other case at Paoli, both in the Territory of Kansas. This court held that when subsequent to his appointment as receiver of the public moneys Brindle was appointed special receiver and superintendent to assist the special commissioner "in disposing of the trust lands he was employed to render a service in no way connected with the office he held. He was not appointed to any office known to the law. *No new duty was imposed upon him as receiver of the Land Office.* The President was, both by the treaties and the act of 1855, charged with the duty of selling the lands, and under his instructions Brindle was employed to assist in the work. By express provisions in the treaties the expenses incurred by the United States in making the sales were to be paid from the proceeds. This clearly implied the payment of a reasonable compensation for the services of those employed to carry the trust into effect."

In the case at bar the duty had already, prior to claimant's appointment, been imposed on the various receivers and registers as such, of attending to the sale of these lands within their various districts, and express provision had been made that in no case was their compensation to exceed the maximum sum already provided by law. When such provision had

been made in regard to compensation there is no room for any implication of a promise to pay an additional reasonable compensation for the services of such registers and receivers in the sale of those lands. Such implication was specially negatived before the claimant took office. He received his pay under the provision of law already stated, without any protest or claim on his part that he was entitled to anything further or other than the amount he from time to time received. More than thirty years after the last payment, Congress passed the act of March 3, 1903, the thirteenth section of which is contained in the foregoing statement of facts. The passage of the act did not imply any admission that there was anything due the claimant. It simply provided for the presentation of his claim to the court and for a decision on the merits, without assuming to say that he had any claim of a meritorious nature.

We agree with the Court of Claims that the claimant has failed to make out a case, and the judgment dismissing his petition is

Affirmed.

Mr. Justice MOODY took no part in the decision of this case.

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Test:

Clerk Supreme Court, U. S.